Supreme Court, U.S.
FILED
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No. 03 - 95

In the Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner

v.

NANCY DREW SUDERS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the affirmative defense recognized in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)?

PARTIES TO THE PROCEEDING

The petitioner is the Pennsylvania State Police, an agency of the Commonwealth of Pennsylvania.

The respondent is Nancy Drew Suders.

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 325 F.3d 432 and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The decision of the District Court is not reported, but is reprinted at Pet. App. 62a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 2003, and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

§ 2000e. Definitions.

For the purposes of this subchapter —

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees ... and any agent of such a person....

§ 2000e-2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex, or national origin....

STATEMENT OF THE CASE

This is an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The employee claims that she was constructively discharged — that is, she was forced to quit her job — because her supervisors subjected her to an atmosphere of sexual harassment and discrimination which made her working conditions intolerable. The Court of Appeals held that, when precipitated by the actions of a supervisor, a constructive discharge is a "tangible employment action" within the meaning of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998), thereby precluding the employer from offering the affirmative defense recognized by those cases, and instead subjecting the employer to strict liability for the actions of its supervisors. Nevertheless, the Court of Appeals acknowledged that the courts of appeals and other federal courts are deeply divided over this issue, and acknowledged as well that its decision would create "thorny evidentiary issues" for trial courts. The Court should therefore take this opportunity to resolve this issue, which is of considerable practical importance in employment discrimination law.

1. The respondent, Nancy Drew Suders, worked for the petitioner, the Pennsylvania State Police, as a police communications operator. Respondent began work in March of 1998, and was assigned to work at the State Police barracks in McConnellsburg, Pennsylvania. Pet. App. 62a-63a. The station commander at the McConnellsburg barracks was Sergeant Eric Easton; two State Police corporals, William Baker and Eric

Prendergast, also exercised some supervisory authority over respondent. Pet. App. 8a-9a.

Respondent claimed[1] that Easton, Baker and Prendergast began harassing her on a daily basis shortly after she began working at the barracks. Pet. App. 64. The harassment included repeated attempts to engage her in discussions of bestiality, oral sex and genital piercing; repeated re-enactments — five to ten times a shift, even after respondent asked that it stop — of a "wrestling move" in which Baker would "grab hold of his private parts and yell suck it"; intimidating acts such as hitting office furniture; and various other sexually charged posturing, leering and remarks. Pet. App. 64a-66a.

Respondent was aware of the State Police's policy against sexual harassment, and the policy was both posted at the McConnellsburg barracks and distributed to all employees. Pet. App. 78a-79a. In June of 1998, as part of her training, respondent attended a class in sexual harassment taught by the State Police's affirmative action officer, Virginia Smith-Elliot. Respondent told Smith-Elliot that she might need some help, but did not supply any details. She obtained Smith-Elliot's telephone number, but did not contact her again until two months later, two days before she resigned. On August 18, respondent telephoned Smith-Elliot and told her that she was being harassed. According to respondent, Smith-Elliot told her to fill out a complaint

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[1]The District Court resolved this case by granting the petitioner's motion for summary judgment, and we, like the courts below, therefore recite the facts in the light most favorable to respondent.

form, but respondent was unable to find the form and Smith-Elliot did not offer to send her one.[2] Pet. App. 67a.

Two days later, on August 20, 1998, respondent quit the State Police. Respondent had several times taken a test on her computer skills. Each time, her supervisors told her that she had failed, but she believed that they had lied to her and had not turned in her test results. She went through a drawer in the women's locker room, found her test papers and removed them.[3] After the loss of these papers was discovered, officers dusted the drawer with theft detection powder. On August 20, respondent again went through the drawer — to return her test papers, she said — and the powder turned her hands blue. When Corporal Baker confronted her, respondent told him that she was resigning. She claims that she was not allowed to leave the barracks, but was treated as a suspect, photographed and questioned.[4] She turned in a letter of resignation which she had been carrying with her, and eventually was permitted to leave. Pet. App. 11a-12a, 68a-69a.

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[2]Smith-Elliot testified that respondent complained that she was being discriminated against because of her age and political affiliation, but did not mention any sexual harassment; and that she promised to send a complaint form to respondent. Pet. App. 11a, 67a.

[3]Respondent contended that the drawer was not assigned to anyone in particular, while others said that the drawer was assigned to another officer and contained her personal belongings. Pet. App. 11a-12a, 68a.

[4]Sergeant Easton testified that, after respondent was questioned about the blue on her hands, she was told to take the rest of the evening off. Pet. App. 68a.

2. Respondent filed this action in the District Court pursuant to Title VII,[5] claiming that she had been "forced to endure an insulting and humiliating work environment and ... forced to suffer a termination of employment." Pet. App. 69a (quoting complaint). After discovery, the petitioner moved for summary judgment, which the District Court granted.

The District Court, viewing the facts in the light most favorable to respondent, held that genuine issues of material fact remained on the issue of whether respondent had been subjected to a hostile work environment. Pet. App. 74a-77a. Nevertheless, the District Court granted judgment to the petitioner, on the ground that even if a hostile environment existed, petitioner had established an affirmative defense to vicarious liability for its supervisors' actions. The District Court relied on *Faragher v. City of Boca Raton, supra*, which recognized an affirmative defense against claims of "an actionable hostile environment created by a supervisor ... [w]hen no tangible employment action is taken."

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Pet. App. 77a, *quoting Faragher*, 524 U.S. at 807-08. *See also Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765 (same).

The District Court held that petitioner had in place both an anti-harassment policy and a corrective mechanism, that respondent was aware of both, but that she had not attempted to take advantage of them until two days before she resigned; thus, "the [petitioner] was never given the opportunity to respond to any complaints of sexual harassment." Pet. App. 80a. The District Court therefore concluded that respondent had "failed to avail herself of [petitioner's] internal procedures for reporting any harassment," and granted petitioner's motion for summary judgment. *Ibid.* The District Court did not separately address respondent's claim that her resignation as the result of the hostile environment was in reality a constructive discharge.

3. The Court of Appeals reversed the District Court's judgment. The Court of Appeals found two "fundamental[] flaws," Pet. App. 20a, in the District Court's analysis. First, the Court of Appeals held that it was "unclear whether the PA State Police exercised reasonable care to prevent or correct the sexual harassment that Suders claimed she suffered," and that these material disputes of fact precluded summary judgment on the petitioner's

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[5]In addition to her claim of sex discrimination under Title VII, respondent also raised claims of age and political affiliation discrimination, and sought relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Pennsylvania Human Relations Act, Pa. Cons. Stat., tit. 43, § 951 *et seq.* She sued, in addition to petitioner, Sergeant Easton, Corporals Baker and Prendergast, and Ms. Smith-Elliot. Pet. App. 69a. The District Court resolved all of these claims against respondent. *See* Pet. App. 70a-74a, 80a-81a. Respondent appealed, however, only as to the Title VII sex discrimination claim against the State Police, Pet. App. 15a-16a, and that is the only claim involved in this petition.

affirmative defense to the hostile environment claim.[6] *Ibid.*

Second, "and more importantly," the District Court had failed to consider respondent's claim of constructive discharge. *Ibid.* The Court of Appeals first held that, on the record presented for summary judgment, a jury might find that respondent had in fact been constructively discharged. Pet. App. 26a-28a. The Court of Appeals then considered whether petitioner should be permitted to assert the *Ellerth/Faragher* affirmative defense to this claim.

> *Ellerth* and *Faragher* hold that an employer is strictly liable to a victimized employee for the harassment or discrimination of its supervisors if the harassment or discrimination resulted in a tangible employment action. In that case, an employer is precluded from invoking the affirmative defense. If, however, the harassment or discrimination did not amount to a tangible employment action, the employer is entitled to assert the affirmative defense.

App. 28a. The Court of Appeals thus turned to what it called the "critical issue in this case: whether a constructive discharge, when proved, constitutes a tangible employment action." Pet. App. 28a-29a. After an extensive discussion, *see* Pet. App. 28a-57a, the Court of Appeals concluded that it does.

The Court of Appeals first "recognize[d] a division among the Courts of Appeals as to this issue." Pet. App. 39a. Both the Second and the Sixth Circuits had held that a "constructive discharge does not constitute a

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[6]Petitioner does not challenge this aspect of the Court of Appeals' decision.

'tangible employment action' as that term is used in *Ellerth* and *Faragher*." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), *quoted at* Pet. App. 39a. *Accord Turner v. Dowbrands Inc.*, 2000 WL 924599 (6th Cir. 2000)(unpublished), *cited at* Pet. App. 40a-41a. The Eighth Circuit, on the other hand, had held that a constructive discharge does constitute a "tangible employment action." Pet. App. 41a-42a, *citing Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) and *Jackson v. Arkansas Dep't of Ed.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002). The Court of Appeals noted that district courts which had addressed the issue were likewise divided. Pet. App. 42a (collecting cases). Finally, both the Seventh and the Ninth Circuits had recognized, but not decided, this issue. Pet. App. 42a-43a, *citing Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 n. 8 (9th Cir. 2001) and *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 666-67 (7th Cir. 2001).

In a lengthy discussion, *see* Pet. App. 45a-53a, the Court of Appeals rejected the reasoning of *Caridad* and similar cases as unpersuasive. The Court of Appeals proceeded to its own analysis, and concluded that a constructive discharge does constitute a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. Where a constructive discharge has occurred, then, the employer may not assert the *Ellerth/Faragher* affirmative defense; and if the existence of a constructive discharge is in dispute at the summary judgment stage, the employer may not seek summary judgment on the basis of the affirmative defense. Pet. App. 57a.

In reaching its conclusion, the Court of Appeals relied primarily on the idea, established in circuit precedent, that a constructive discharge is the "functional equivalent

of an actual termination." Pet. App. 50a, *citing Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir.1996). A constructive discharge, like a formal termination, constitutes a "significant change in employment status," and inflicts "direct economic harm" on the employee, Pet. App. 50a; and these, in the Court of Appeals' view, are the "primary attributes" of a "tangible employment action." Pet. App. 54a. The Court of Appeals also thought that imposing strict liability on employers for constructive discharges would "encourage employers to be watchful of sexual harassment ... and to remedy complaints at the earliest possible moment," Pet. App. 56a; while the contrary holding could have the "perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment." Pet. App. 55a.

The Court of Appeals conceded that the elements of a constructive discharge overlap with the elements of the *Ellerth/Faragher* affirmative defense. Pet. App. 58a. Establishing a constructive discharge entails an enquiry into whether the employee's decision to resign was reasonable, and therefore

> it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs. These are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*.

Ibid. Thus, there is a "substantial risk" that evidence amounting to the affirmative defense might come in through the "back door," even in cases where, under the Court of Appeals' approach, the affirmative defense is not available. Pet. App. 58a-59a. Nevertheless, the Court of

Appeals discounted this risk, confident that the "wisdom and expertise of trial judges," Pet. App. 60a, would enable them to deal with these "thorny evidentiary issues." Pet. App. 58a.

REASONS FOR GRANTING THE WRIT

I. The Federal Courts Are Deeply Divided Over the Availability of the *Ellerth/Faragher* Affirmative Defense in Cases Claiming a Constructive Discharge.

In the five years since the Court decided *Ellerth* and *Faragher*, the federal courts have considered the question presented by this case on many occasions, but have been unable to reach a consensus. Rather, the courts have coalesced around two competing and irreconcilable views.

The Eighth Circuit, now joined by the Third, holds hat a constructive discharge which results from a supervisor's harassment is a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. *See Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) ("constructive discharge constitutes a tangible employment action which precludes an employer from utilizing the affirmative defense"). The Fifth Circuit, while it has not addressed the issue directly, has suggested that it agrees. *See Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 410 n. 15 (5th Cir. 2002) (for purposes of *Ellerth/Faragher* affirmative defense, plaintiff "does not advance a coherent claim of constructive discharge or other tangible employment actions").

The Second and Sixth Circuits, on the other hand, hold that a constructive discharge under such circumstances does not constitute a "tangible employment action." *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999), *cert.*

denied, 529 U.S. 1107 (2000) ("constructive discharge is not a tangible employment action warranting the imposition of strict liability under the *Ellerth/Faragher* standard"); *Turner v. Dowbrands, Inc.*, 2000 WL 924599 (6th Cir., June 26, 2000) (unpublished) (following *Caridad*). The First Circuit has likewise held that a constructive discharge resulting from supervisor harassment was not a "tangible employment action," while leaving open the possibility that on "rare facts," it might hold otherwise. *Reed v. MBNA Marketing Systems, Inc.*, — F.3d —, 2003 WL 21403692, *4 (1st Cir., June 19, 2003).[7] And the Tenth Circuit, while it has not decided the issue, has suggested that it too agrees with the Second Circuit. *See Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1231-32 (10th Cir. 2000) (citing *Caridad* with approval for the proposition that "'tangible employment action' is not synonymous with 'constructive discharge'").

This division among the courts of appeals has been widely recognized. *See, e.g.*, Pet. App. 39a; *Reed v. MBNA Marketing Systems, Inc.*, at *3 n. 2; *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 n. 8 (9th Cir. 2001). It is replicated by a similar division among the district courts, *see* Pet. App. 41a-42a & n. 14 (collecting cases)[8];

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[7]The First Circuit suggested that this result might change only where the constructive discharge results from actions which themselves would constitute tangible employment actions: "*official* actions by the supervisor — e.g., an extremely dangerous job assignment to retaliate for spurned advances...." *Ibid* (emphasis in original).

[8]*See also Martin v. Inhabitants of City of Biddeford*, 2003 WL 1712510, *11 (D.Me., April 1, 2003) (not a tangible employment action); *Munroe v. Compaq Computer Corp.*, 229 F.Supp.2d 52, 62 (D.N.H. 2002) (same); *cf. Chavera v. Victoria Ind. Sch. Dist.*, (continued...)

and shows no sign of resolving itself. The issue has been thoroughly aired in the lower courts, which are locked in disagreement, and the Court should now resolve it; for as the Court of Appeals noted and as we discuss below, this issue is of "critical importance to civil actions brought ... pursuant to Title VII." Pet. App. 4a.

II. This Is a Recurrent and Important Issue in Federal Employment Discrimination Law, on Which the Court Should Establish a Uniform and Predictable Federal Standard.

The Court first addressed standards of employer liability for the actions of supervisors in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The Court held in *Meritor* that Congress did not intend in Title VII that employers be "always automatically liable for sexual harassment by their supervisors"; and while the Court declined to issue "a definitive rule on employer liability," the Court did hold that the courts should look to traditional agency principles for guidance. *Id.*, at 72. In the wake of *Meritor*, the courts of appeals "struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees," *Faragher*, 524 U.S. at 785; and the Court provided further guidance in *Faragher* and *Ellerth*, emphasizing the importance of establishing a "uniform and predictable standard ... as a matter of federal law." *Ellerth*, 524 U.S. at 754. This case represents the next step in establishing that "uniform and predictable standard."

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[8](...continued)
221 F.Supp.2d 741, 747-48 (S.D.Tex. 2002) (tangible employment action).

As the cases cited in the preceding section illustrate, the federal courts, and of course employers and employees, frequently confront the issue presented by this case, and there is no question but that it will continue to recur. Nationally, the EEOC reports that it received over 84,000 charges of employment discrimination in fiscal year 2002[9]; during the same period, over 20,000 employment discrimination actions were filed in the federal district courts.[10] Even if only a small fraction of these cases involve claims of constructive discharges,[11] thousands of employers and employees are affected by this issue every year. Employers and employees require a "uniform and predictable standard" by which to guide their conduct, both in the workplace and in litigation, and the federal courts require it in order properly to resolve the disputes which come before them. The Court should provide them with the necessary guidance.

CONCLUSION

The Court should grant the petition.

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[9]EEOC, *Charge Statistics FY 1992 through FY 2002*, available at http://www.eeoc.gov/stats/charges.html (visited July 9, 2003).

[10]ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *Judicial Business of the United States Courts: 2002 Report of the Director* at 130 (Table C-2).

[11]The EEOC reports that in 2002, among filed charges alleging discrimination on the basis of national origin, about 7% included claims of constructive discharge. *See* EEOC, *National Origin Charge Data by Issue — Receipts*, available at http://www.eeoc.gov/origin/no_receipts.html (visited July 9, 2003).

Respectfully submitted,

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APPENDIX

PRECEDENTIAL
Filed April 16, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3512

NANCY DREW SUDERS,
Appellant,

v.

ERIC D. EASTON, WILLIAM D. BAKER, ERIC B. PRENDERGAST, VIRGINIA SMITH ELLIOTT, AND THE PENNSYLVANIA STATE POLICE

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court Judge: The Honorable Sylvia H. Rambo
(00-CV- 01655)

Argued on April 11, 2002
Before: MCKEE and FUENTES, *Circuit Judges*, and POGUE,* *Judge*

(Opinion Filed: April 16, 2003)

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*The Honorable Donald C. Pogue, United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

FUENTES, Circuit Judge:

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court addressed the scope of the vicarious liability of an employer for the discriminatory and harassing conduct of its supervisors in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The Court also sought to clarify the confusion among the Courts of Appeals as to the scope and proper grounds for such liability. To that end, the Court held that an employer shall be strictly liable to a victimized employee for an actionable hostile work environment created by a supervisor, when the discrimination or harassment at issue results in a

"tangible employment action."[1] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Furthermore, the Court defined a tangible employment action in general, categorical terms: "a significant change in employment status," often, but not always, resulting in economic injury. *Ellerth*, 524 U.S. at 761-62; *see also Faragher*, 524 U.S. at 808. A tangible employment action was also defined by reference to a non-exclusive list of possible actions: "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790. When no tangible employment action results, the employer may still be liable, but it may raise an affirmative defense to liability or damages. The affirmative defense has two components: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

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[1]The concept of a tangible employment action is distinct from that of a materially adverse employment action which is a necessary element of a prima facie case under Title VII. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir.1997); *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). Litigants, and oftentimes courts, confuse the two. *See Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 743-44 (7th Cir.2002) (discussing courts' use of the terms "tangible employment action" and "materially adverse employment action."). Courts have yet to address the differences between them. It is worth noting generally that because *Ellerth* and *Faragher* create a rule of strict liability, we understand a tangible employment action as being a narrower, more restricted category of actions occurring in the workplace.

Against this backdrop, the matter on appeal raises novel issues of law of critical importance to civil actions brought in our Circuit pursuant to Title VII. Among those we are asked to review, we address today the issue of whether a constructive discharge constitutes a tangible employment action, such that the affirmative defense to the liability of an employer for the discriminatory conduct of its supervisors would not be available to the employer. Although our analysis is informed by the Supreme Court's decisions in *Ellerth* and *Faragher,* our ruling today necessarily reaches issues that were not specifically addressed by the Court in either of those two decisions.

In the underlying action, plaintiff Nancy Drew Suders ("Suders") alleged that she was subjected to a sexually hostile work environment and discriminated against on the basis of her age and political affiliation. She also contended that she was constructively discharged. Suders identified three officers of the Pennsylvania State Police ("PA State Police") as the primary harassers and sought to hold the PA State Police vicariously liable for the actions of its agents. After the close of discovery, defendants moved for summary judgment. The District Court granted the motion in its entirety. As to her claim of a sexually hostile work environment, the District Court found that, although Suders had raised genuine issues of material fact as to each requisite element, the PA State Police was entitled to raise the affirmative defense set forth in *Ellerth* and *Faragher.* Having found that the PA State Police met its burden of establishing the affirmative defense, the District Court granted summary judgment as to Suders's claim of a sexually hostile work environment. The Court failed to address Suders's claim of constructive discharge and whether such a claim would affect the availability of the PA State Police's assertion of the affirmative defense.

We will reverse the District Court's judgment as to Suders's claim of a sexually hostile work environment. In so doing, we hold that a constructive discharge, when proved, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher.* Consequently, when an employee has raised a genuine issue of material fact as to a claim of constructive discharge, an employer may not assert, or otherwise rely on, the affirmative defense in support of its motion for summary judgment.

I.

A. Background[2]

Suders is a wife and mother of three children. From approximately 1988 until her employment with the PA State Police, Suders was Chief Deputy Sheriff and Secretary to the Fulton County Sheriff. She had a wide array of responsibilities, including bookkeeping, transporting prisoners, serving warrants, and administering special programs. Suders also served as an active member of the local chapter of the Republican Party. In connection with her political activities, she became acquainted with Mikael Fix, the Republican County Chairman, and Robert Jubelirer, a State Senator. Sometime in 1998, these individuals suggested to Suders that she apply for an open position with the PA State Police. When she decided to apply, Chairman Fix assisted Suders in her application.

During the pendency of her application and before accepting a position, Suders heard from the Fulton County Sheriff that officers of the PA State Police were

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[2]In our review of the factual background, we must resolve all factual doubts and draw all reasonable inferences in favor of Suders, the party opposing the motion for summary judgment. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1077 n. 1 (3d Cir.1996).

opposed to her candidacy because they viewed her as a political appointment. The extent to which Republican party officials intervened on behalf of Suders is unclear. Nevertheless, Chairman Fix eventually told Suders that the PA State Police had approved her application.

Suders accepted a position as a police communications operator ("PCO") with the PA State Police and commenced her employment on or about March 23, 1998, at the McConnellsburg barracks. Her employment began with a probationary period, during which Suders worked alongside another PCO. In June 1998, Suders attended a formal, two-week training program, after which she undertook the duties of a PCO by herself.

Starting from her probationary period and steadily escalating after her two-week training period, Suders alleged that she suffered mistreatment and sexual harassment so severe that she ultimately felt compelled to resign on August 20, 1998. She recounts several instances of name-calling, repeated episodes of explicit sexual gesturing, obscene and offensive sexual conversation, and the posting of vulgar images. According to Suders, the following defendants were the main perpetrators of the sexual harassment that she allegedly suffered: Sergeant Eric D. Easton ("Easton"), Station Commander of the McConnellsburg barracks; Patrol Corporal William D. Baker ("Baker"); and Corporal Eric B. Prendergast ("Prendergast").

As Station Commander, Sergeant Easton was responsible for the day-to-day supervision of the McConnellsburg barracks. Even before she commenced her employment with the PA State Police, Suders encountered problems with Easton. Easton told Suders that he had some concerns about her and that anything she would say would simply be her word against his. Suders also recalled that every time she would go into

Easton's office, "he would bring up [the subject of] people having sex with animals.... [T]hat's all the man wanted to talk about." *Suders v. Easton*, No. 00-CV-1655, slip op., at 3 (M.D.Pa. Aug. 16, 2001) (the *"Decision"*) (quotations and citations omitted). Easton and Prendergast often had discussions in front of Suders, and on one occasion, Easton stated that "if someone had a daughter, they should teach her how to give a good blow job!" App. at 151. Easton once commented to Suders that his wife had small breasts.

Easton also made disparaging remarks about Suders's age. he commented to Suders that "[i]t is awful getting old, isn't it Nancy?" *Decision*, at 2 (quotations and citations omitted). Easton also remarked that "a 25-year-old could catch on faster than [Suders] could." *Id.* at 3 (quotations and citations omitted).

The sexually charged nature of Easton's conduct toward Suders was not limited to conversation. She was offended "when Defendant Easton, wearing spandex shorts, would sit down in the chair [near Plaintiff's work space], put his hands behind his head and spread his legs apart." *Id.* (quotations and citations omitted). She claimed that Easton would leer at her. Suders conceded that Easton never made any overt sexual advances towards her, but she had no idea "what he was going to do." *Id.* (quotations and citations omitted). Suders avoided Easton to the extent possible.

Easton did not deny making many of the statements above; instead he claimed that Suders misinterpreted them. As to the statements concerning Suders's age, Easton allegedly made them in order to defend Suders and to explain why she might be having trouble catching on to the job. With regard to the statements concerning bestiality and oral sex instruction, Easton claimed that they pertained to actual investigations. Easton also noted

that Suders was generally disorganized, frequently late for work, and easily overwhelmed by her job responsibilities. When he attempted to offer constructive criticism, he claimed that Suders did not handle it well.

As a Patrol Corporal at the McConnellsburg barracks, defendant Baker also had a supervisory role at the station.[3] According to Suders, Baker was responsible for the most inflammatory harassment that she suffered. Soon after she began working at the communications desk by herself, Suders recalled that Baker had a habit of making obscene gestures to her, as many as five to ten times per night throughout her five-month tenure at the station. These gestures followed the same pattern. In an apparent imitation of a move popularized by televised wrestling, Baker would "cross his hands, grab hold of his private parts and yell, suck it." App. at 65. Suders recalled that "[t]he man did this, and he would beat on it. He would beat his hands on his crotch too and yell suck it. He would ask me to do this garbage.... All he wanted to do was play with his crotch." *Id.* at 65-66. Suders claimed that Baker kept a picture near his work space of a professional wrestler performing this same gesture. In between these offensive acts, Baker would take time to rub his rear end in front of her and remark "I have a nice ass, don't I?" *Id.* at 67. Another time, Baker announced to Suders, without invitation, that he intended to pierce his genitals and that his wife would pierce her nipple. Baker also referred to Suders as "momma." *Decision,* at 5 (quotations and citations omitted).

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[3]Sergeant Easton explained that "[e]ach corporal had some similar duties as far as running the shift, responding to incidents depending on the severity of the incident, and each corporal had some specialized duties.... Then each corporal also had specific personnel assigned to them to supervise." App. at 215.

On one occasion, Suders confronted Baker about his offensive conduct, specifically about his repeated gestures. She told him "I don't think you should be doing this." App. at 66. According to Suders, Baker responded by grabbing a straight back chair in the communications room, jumping onto it, and repeating the move, including the verbal exclamation.

As a Corporal, defendant Prendergast shared some supervisory authority with Baker.[4] Suders contended that Prendergast verbally harassed her day after day. He called Suders a liar and told her that "the village idiot could do her job." App. at 69. She also testified that Prendergast would wear black gloves, pound on the furniture in the communications room, and intimidate her. According to Suders's complaint filed on September 18, 2000, Prendergast allegedly told her that she would be "the last political appointee who had a job there at the substation." *Id.* at 30.

As often happens in cases involving allegations of sexual harassment, the defendants' recollections of the events differ from Suders's. The testimony of the PA State Police officers is notable, however, for its internal inconsistencies and ambiguities. For instance, Baker adamantly denies that he ever performed the wrestling gesture in front of Suders. When asked if he ever saw this harassment take place, however, Prendergast seemed to deny any recollection at first, but then conceded that he may have seen Baker perform it on one occasion. *Id.* at 252.

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[4]As Easton noted, "Eric Prendergast I believe was the corporal who was assigned to [Suders], but if he was not working say a three to eleven shift, then it would be whatever corporal was working that shift would be in charge of the shift." App. at 224.

As noted above, Suders attempted to confront at least one of the defendants, Baker, by asking him to stop the offensive conduct. She did not, however, report any of the incidents to anyone else at the McConnellsburg barracks. In her own words, Suders explained that "there was no one on that station that I could go to. I had a sergeant there who was talking about abusing children and bestiality. There was no way I was going to be able to tell him. There was nobody." *Id.* at 68.

In the summer of 1998, the relationship between Suders and the defendants rapidly deteriorated in a series of events that led to her departure. It began when an accident file turned up missing. Baker asked Suders if she had the misplaced file, and when she responded that she did not, Prendergast accused her of taking the file home. *Decision,* at 5.

At this point, the situation was critical enough that Suders sought help from persons outside the McConnellsburg barracks. During her formal training in June 1998, Suders approached defendant Virginia Smith-Elliott ("Smith-Elliott"), who, in her capacity as Equal Employment Opportunity Officer of the PA State Police, had taught a training class on sexual harassment that Suders had attended. Without mentioning details, Suders told Smith-Elliott that she might need some help. Smith-Elliott gave Suders her phone number. Neither Suders nor Smith-Elliott followed up on the matter.

On July 22, 1998, Suders received a supervisor's notation for failing to complete an assignment given to her back in May. Days later, on July 26, 1998, Suders was reprimanded again, ostensibly because she had not properly disseminated information about an escaped convict from Ohio. Suders claimed that she received advice from someone at the station that she need not worry about the message because the escapee was from

Ohio. Based on that advice, Suders simply placed the information in a Corporal's bin. During this time period, the sexual harassment noted above continued unabated.

On or about August 18, 1998, Suders reached a breaking point. She contacted Smith-Elliott again, and this time, Suders specifically mentioned that she was being harassed and that she was afraid. According to Suders, Smith-Elliott was insensitive and unhelpful. Smith-Elliott instructed her to file a complaint on a standard form without telling Suders where to obtain the form. Suders attempted to find the correct form in employee manuals, but never found it. She was fearful that Prendergast was watching her every move. For her part, Smith-Elliott acknowledged that Suders contacted her around then, but that Suders never mentioned any incidents of sexual harassment, complaining only of age and political affiliation discrimination. Smith-Elliott also recalled that she promised to send Suders the proper complaint form.

Two days after the phone conversation with Smith-Elliott, one final incident proved to be the last straw. Suders alleged that, on August 20, 1998, the other officers set her up and falsely accused her of theft. The events leading up to the incident occurred as follows. Officers of the PA State Police were required to take an exam designed to measure computer skills. The results were supposed to be sent to Hollidaysburg, where the department in charge of officer education was located. Suders took the exam several times, and each time her supervisors told her that she had failed. She believed that the officers lied to her about the test results and that they never sent her test scores to Hollidaysburg because she found her exams in a set of drawers in the women's locker room. Suders contended that those drawers were not assigned to any specific officer, while the PA State

Police countered that the drawers contained another PCO's private belongings.

At some point, the officers realized that Suders's test results were missing. The officers dusted the drawers and the file inside with a theft detection powder that is invisible to the eye, but reacts when touched by hand, thereby turning the hand of a suspected thief blue. Suders testified that, on that day, she sought to return the papers that she had earlier obtained. Her hands turned unmistakably blue. When the officers in the barracks apprehended Suders, they treated her as they would an accused suspect. She was handcuffed, photographed, and questioned. She felt "abused, threatened and held against her will." *Decision*, at 7 (quotations and citations omitted).

Any prospect for reconciliation was now lost. Suders had prepared a written resignation prior to the events of August 20, 1998 and had been carrying it with her. After the accusation of theft and the questioning by her supervisors, Suders tendered her resignation. When Suders attempted to leave the barracks, Baker told her that she could not leave because she was a "suspect." *Id.* Later, the officers took Suders into an interrogation room, where Easton advised Suders of her *Miranda* rights. After being detained for further questioning, Suders demanded to be released. When Suders reiterated her intent to resign, Easton ultimately permitted her to leave.

B. The District Court's Decision

In the underlying action, Suders asserted that she was discriminated against on the basis of age, political affiliation, and sex. Her claims were based on the following statutes: (1) the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"); (2) Title VII; and (3) the Pennsylvania Human Relations Act,

43 PA. CONS.STAT. ANN. § 951, *et seq.* ("PHRA"). Suders brought all three claims against Easton, Baker, Prendergast, Smith-Elliott, and the PA State Police.

After the close of discovery, defendants moved for summary judgment. The District Court granted the motion in its entirety. First, the District Court held that neither Title VII nor the ADEA contemplates the liability of individual employees. The Court cited our decisions in *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 184 (3d Cir.1997), and *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3d Cir.1996), in granting summary judgment in favor of the individual defendants on Suders's Title VII and ADEA claims.

With respect to Suders's ADEA claim against the PA State Police, the Court held that the Eleventh Amendment barred the claim against a state agency. *Decision*, at 12 (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91(2000)). The Court also noted that, because Eleventh Amendment immunity extends to similar claims based on state law causes of actions, Suders's PHRA claim against the PA State Police was also barred.

With regard to the PHRA claims against the individual defendants, the defendants argued that the Eleventh Amendment immunity enjoyed by the PA State Police also barred any claim against a state official for actions taken within the course of employment. Therefore, the defendants contended that, to the extent that the PA State Police was immune from Suders's claim under the PHRA, the individual defendants were also immune from those claims. The District Court observed that Suders had not responded to this argument and, therefore, granted summary judgment in favor of the individual defendants on the PHRA claims.

The District Court's analysis left Suders with two claims pursuant to Title VII: her hostile work environment and constructive discharge claims against the PA State Police. The Court found that Suders had marshaled enough evidence to raise a genuine issue of fact as to each of the following elements of a Title VII action against an employer: (1) the work environment was sufficiently hostile to constitute intentional discrimination; (2) the discrimination was pervasive and regular; (3) the defendants' conduct detrimentally affected Suders; and (4) the defendants' conduct was sufficiently hostile to offend a reasonable person. *Decision*, at 13-15 (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir.1990)).[5]

On the issue of vicarious liability, however, the District Court proceeded with an analysis of the affirmative defense set forth in *Ellerth* and *Faragher*. In that regard, the Court found that "as a matter of law ... [Suders] unreasonably failed to avail herself of the [PA State Police's] internal procedures for reporting any harassment. This is especially true as [Suders] had personal contact with the Affirmative Action officer early in her employment, but failed to pursue this avenue of complaint." *Decision*, at 18. Therefore, the District Court found no genuine issue of material fact as to the PA State Police's assertion of the affirmative defense. The Court thus granted the motion for summary judgment on Suders's remaining claim pursuant to Title VII.

The District Court did not address Suders's claim of constructive discharge. As a result, the Court never reached the issue of whether the claim of constructive discharge would affect the availability of the affirmative defense invoked by the PA State Police.

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[5]*See* part III.A, *infra*. for a discussion of the *Andrews* test.

II.

The District Court had jurisdiction over the underlying action pursuant to 28 U.S.C. §§ 1331, 1343 and 1367. We have jurisdiction to review the final order of the District Court pursuant to 28 U.S.C. § 1291.

Our review of the District Court's grant of summary judgment is plenary. *See Doe v. County of Centre, PA*, 242 F.3d 437, 446 (3d Cir.2001). As we have stated in the past, in the context of summary judgment, we must apply the same test that the District Court applied. *See id.; Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1229 (3d Cir.1988).

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant a motion for summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We must view the evidence presented to the trial court, and any reasonable inferences drawn therefrom, in the light most favorable to the non-moving party. *See Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir.2002). When the factual assertions of the party opposing the motion conflict with those of the movant, we must resolve those conflicts in favor of the former. *See Levendos*, 860 F.2d at 1229 (citing *Jackson v. University of Pittsburgh*, 826 F.2d 230, 232 (3d Cir.1987), *cert. denied*, 484 U.S. 1020 (1988)).

III.

Our analysis begins with the specific claim which Suders appeals, that is, her claim of a sexually hostile

work environment pursuant to Title VII. Then, we address the propriety of the District Court's decision to permit the PA State Police to invoke the affirmative defense to strict liability.

A. Suders's Claim of a Sexually Hostile Work Environment

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e- 2(a)(1). In *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65-67 (1986), the Supreme Court recognized that an employee who has been sexually harassed has a cause of action pursuant to Title VII if the sexual harassment at issue was either a *quid pro quo* scenario, or if the harassment was so pervasive that it had the effect of creating a hostile work environment and of altering the conditions of employment. In the present case, Suders alleged a violation of Title VII based on the second scenario set forth in *Meritor:* a hostile work environment at the McConnellsburg barracks.

Shortly after the Supreme Court's decision in *Meritor,* we addressed a number of issues relating to the burgeoning jurisprudence of sexual harassment. *See Andrews,* 895 F.2d at 1482. In *Andrews,* we held that an employee seeking to bring a hostile work environment claim against his or her employer must establish the convergence of the factors: (1) the employee suffered intentional discrimination because of his or her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the employee; and (4) the discrimination would detrimentally affect a

reasonable person of the same sex in that position.[6] 895 F.2d at 1482; *see also Knabe v. The Boury Corp.,* 114 F.3d 407, 410 (3d Cir.1997).

In *Andrews,* we also discussed a plaintiff's burden with respect to each of the factors. With regard to the first factor, we noted that intentional discrimination is implicit in cases involving "sexual propositions, innuendo, pornographic materials, or sexual derogatory language." *Andrews,* 895 F.2d at 1482 n. 3. In such cases, the intent to discriminate "should be recognized as a matter of course." *Id.* The second factor requires that the "incidents of harassment occur either in concert or with regularity." *Id.* at 1484 (quotations and citations omitted). The third factor is a subjective inquiry of whether the particular plaintiff was demonstrably injured. *See id.* at 1483. And the fourth factor injects a requirement of objectivity: it ensures that employers are held liable only when the work environment is hostile from the standpoint of a reasonable person. *See id.* at 1483 (noting the need to protect employers from "hypersensitive" employees, but recognizing "the goal of equal opportunity" and "the walls of discrimination that deprive women of self- respecting employment.").

When assessing the relevant factors, we are reminded to view the record as a whole and admonished against focusing on either one particular factor or a specific

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[6]The fifth factor of the *Andrews* test is respondeat superior liability. Of course, in the context of the vicarious liability of an employer for the acts of its supervisors, the analysis under the fifth factor is materially altered by the Supreme Court's decisions in *Ellerth* and *Faragher.* Accordingly, we devote Part III.C, *infra,* to discussing this issue. For present purposes, our discussion of Suders's hostile work environment claim is limited to the first four factors.

incident: "Particularly in the discrimination area, it is often difficult to determine the motivations of an action and any analysis is filled with pitfalls and ambiguities. A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Id.* at 1484; *see also Knabe,* 114 F.3d at 410.

With these principles in mind, we agree with the District Court insofar as it held that Suders had raised genuine issues of material fact as to her claim of a sexually hostile work environment. Drawing all reasonable inferences in her favor, Suders established all of the following:

> (1) her own Station Commander had a preoccupation with discussing bestiality and oral sex with her;
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> (2) Easton's "conversations" were accompanied by leering and suggestive posturing — conduct that Suders found offensive;
>
> (3) Baker routinely engaged in sexually-charged acts intended to humiliate or demean Suders, even after he was politely asked to stop. Viewed in the most generous light, his repeated reenactments of the wrestling move were indicative of an immense immaturity and could reasonably be perceived as innuendo; and
>
> (4) When not making offensive gestures with his crotch, Baker attempted to engage Suders in conversations about piercing his genitals.

Although this brief summary does not catalog all of the offensive conduct alleged, it is sufficient to show that a reasonable jury could find that the work environment

at the McConnellsburg barracks was rife with hostility and sexual innuendo. There is no question that under the standard set forth in *Andrews,* Suders has raised genuine issues of material fact as to the intentional nature of the discrimination at the McConnellsburg barracks.

It is also clear that Suders offered evidence sufficient to establish a pattern of sexual harassment that was pervasive and regular. Particularly telling is Baker's repetition of the wrestling move five to ten times per shift. In addition, Easton's conduct, although not daily, occurred with regularity. Together, Baker's and Easton's conduct is sufficient to raise a genuine issue of material fact as to the second factor in *Andrews.*

In addition, both the subjective and objective components of the *Andrews* test are satisfied here. Because of the severe and pervasive harassment of her supervising officers, Suders felt that her only recourse was to draft a resignation letter. With respect to the objective standard, the District Court found that "there was enough conduct in the instant action to raise an issue of fact that the atmosphere was sufficiently hostile to offend a reasonable person in Plaintiff's position. Most persuasive is Plaintiff's testimony regarding the 'wrestling move' that Defendant Baker allegedly repeated five to ten times during each shift that he worked with Plaintiff." *Decision,* at 14-15.

Up to this point in the analysis, we are in complete agreement with the District Court. Suders presented compelling evidence sufficient to raise genuine issues of material fact on her claim of a sexually hostile work environment. We part company with the District Court, however, in the balance of its analysis relating to the liability of the PA State Police. Although it concluded that Suders had marshaled enough evidence to survive the motion for summary judgment, the District Court

proceeded to consider the affirmative defense set forth in *Ellerth* and *Faragher*. Ultimately, it found that the PA State Police was entitled to assert the defense and that there were no issues of fact justifying trial on the merits. Thus, the Court granted summary judgment as to Suders's Title VII claim against the PA State Police.

We believe that the District Court's analysis was fundamentally flawed for two reasons. First, even if the PA State Police could assert the affirmative defense, disputed issues of fact relating to the defense preclude summary judgment here. While the PA State Police contended that it had an effective remedial program in place to address sexual harassment claims, Suders never found the complaint form necessary to trigger an investigation. Moreover, Suders contacted Smith-Elliott twice. The first time, Suders alluded to potential problems and stated that she might need assistance. No attempt was made to follow up on Suders's initial contact. The second time, Suders contended that Smith-Elliott was entirely unhelpful, appearing insensitive at times. On this record, it is unclear whether the PA State Police exercised reasonable care to prevent or correct the sexual harassment that Suders claimed she suffered. Accordingly, the grant of summary judgment on the basis of the affirmative defense was improper.

Second, and more importantly, the Court did not consider Suders's claim of constructive discharge and whether a claim of constructive discharge would affect the availability of the affirmative defense.

B. Constructive Discharge

Suders argued that, as a result of the pervasive sexual harassment and discrimination at the McConnellsburg barracks, she had no alternative but to resign. In other words, she contended that her departure, although

voluntary in the strict sense of the word, was a constructive discharge because of the hostile work environment that she endured. To the extent that the District Court did not recognize a claim of constructive discharge, we hold that the Court erred. The allegations of constructive discharge were apparent on the face of Suders's complaint. In the very first paragraph, Suders alleged that she was "forced to suffer a termination of employment because she would not yield to sexual suggestions, innuendoes and solicitatious [*sic*] behavior." App. at 27. She also stated that "when defendants, by and through [PA State Police] operatives, on August 20, 1998, threatened plaintiff, she felt she had no choice but to resign, and did so out of fear." *Id.* at 34. The record is also replete with testimony relating to harassment, discrimination, false charges of theft, and Suders's eventual resignation. Therefore, we will address the merits of Suders's claim of constructive discharge based on the record presented in the District Court, an inquiry that should have been performed in the first instance by the trial court.

In *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887 (3d Cir.1984), we first recognized that "acts of discrimination in violation of Title VII can make working conditions so intolerable that a reasonable employee would be forced to resign." Noting that the Courts of Appeals were divided as to the findings necessary to support a constructive discharge claim, we adopted an objective standard, as opposed to a specific intent standard: "We hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine. The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *Id.* at 888. In adopting the objective standard, we held that a plaintiff-employee may

prevail on a claim of constructive discharge by establishing that "the conduct complained of would have the *foreseeable* result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." *Id.* at 887-88 (citations omitted) (emphasis added); *see also Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir.1992) (citing *Goss*).

In *Goss*, we were convinced that the objective standard had been met because (1) plaintiff, a saleswoman, was verbally harassed by her supervisor about her plans to have children; (2) after taking sick leave as a result of a miscarriage, her sales territory had been taken away and replaced with a less lucrative territory; and (3) when she objected, plaintiff was told to either accept the assignment or resign. 747 F.2d at 888.

In subsequent decisions, we have elaborated on the requirements of a constructive discharge claim. For instance, we have rejected the imposition of an "aggravating circumstances" requirement often imposed by other Courts of Appeals.[7] *Aman*, 85 F.3d at 1084

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[7]In that regard, we noted that "we cannot state as a broad proposition of law that a single non-trivial incident of discrimination can never be egregious enough to compel a reasonable person to resign. An employment discrimination plaintiff may simply face a more difficult burden of proof in establishing the employer's liability, when relying on a single discriminatory incident as a basis for arguing the occurrence of constructive discharge." *Levendos*, 860 F.2d at 1232; *see also Aman*, 85 F.3d at 1084.

When we decided the appeal in *Levendos*, at least three Courts of Appeals had articulated an aggravating circumstances requirement. *See Levendos*, 860 F.2d at 1232 n. (continued...)

(citing *Levendos*, 860 F.2d at 1232). Therefore, in *Aman*, we held that "[t]he fact that [plaintiff] had been subject to continuous discrimination during her employment could support a conclusion that she simply had had enough. No other precipitating facts were legally required." 85 F.3d at 1084.

Despite our rejection of an aggravating circumstances requirement, we have stated that a plaintiff claiming constructive discharge must demonstrate that the alleged discrimination surpasses "a threshold of 'intolerable conditions." ' *See Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 169 (3d Cir.2001); *Connors v. Chrysler Financial Corp.*, 160 F.3d 971, 976 (3d Cir.1998). In *Connors*, we noted that

> "Intolerability" is not established by showing merely that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign; presumably every resignation occurs because the employee believes that it is in his interest to resign. Rather, "[i]ntolerability ... is assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt *compelled* to resign,"-that is, whether he would have had no choice but to resign.

160 F.3d at 976 (emphasis in original) (quoting *Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir.1996)).

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[7](...continued)
9 (citing *Nolan v. Cleland*, 686 F.2d 806, 813 (9th Cir.1982); *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir.1981); *Clark v. Marsh*, 665 F.2d 1168 (D.C.Cir.1981)).

In *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159, 1161 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993), we sought to refine these requirements further by identifying several situations that may be indicative of constructive discharge: (1) a threat of discharge; (2) suggestions or encouragement of resignation; (3) a demotion or reduction of pay or benefits; (4) involuntary transfer to a less desirable position; (5) alteration of job responsibilities; (6) unsatisfactory job evaluations. Our identification in *Clowes* of situations that often accompany constructive discharge was not intended to be exhaustive; rather the situations were intended "to illustrate *some* of the factors on which plaintiffs claiming constructive discharge have relied." 991 F.2d at 1161 n. 1 (emphasis added); *see also Duffy*, 265 F.3d at 168 ("[W]e have never made the *Clowes* factors an absolute requirement for recovery.... The absence of the factors in *Clowes* is not necessarily dispositive."). Nevertheless, the situations delineated in *Clowes* have assisted courts in our Circuit over the years in identifying meritorious constructive discharge claims. *See, e.g., Duffy*, 265 F.3d at 168 ("The District Court correctly recognized that Duffy had failed to demonstrate any of the factors listed in *Clowes*.").

Furthermore, we recognized another important consideration in *Clowes* that relates to the inquiry of whether a reasonable person would have felt compelled to resign: "As other courts of appeals have noted, a reasonable employee will usually explore such alternative avenues thoroughly before coming to the conclusion that resignation is the only option." 991 F.2d at 1161 (citations omitted). We underscore that this consideration does not amount to a *quasi* exhaustion requirement: "We do not require such steps to be taken in all cases. An employee may be able to show working conditions were so intolerable that a reasonable employee would feel forced to resign without remaining on the job for the

period necessary to take those steps." *Id.* at 1162 n. 6. Therefore, it is relevant to a claim of constructive discharge whether a plaintiff explored alternative avenues to resolve the alleged discrimination, but the plaintiff's actions must be considered in light of the totality of circumstances. *Clowes* simply recognizes that, in many cases, a reasonable person will not react to minor harassment or workplace disturbances by heading straight for the exit and that, in others, the harassment or discrimination may be so severe that any reasonable person would feel compelled to walk out immediately.

Based on our existing jurisprudence, then, we reiterate that a plaintiff-employee alleging a constructive discharge in violation of Title VII must establish the convergence of two factors: (1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; in that regard, although we cannot say as a matter of law that a single incident of discrimination is insufficient to show a constructive discharge, the employee has the burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation-that is, his or her decision to resign-was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign.

By its nature, the inquiry is "a heavily fact-driven determination." *Levendos*, 860 F.2d at 1230. When an employee meets his or her burden under this test, a constructive discharge operates as the functional

equivalent of an actual termination. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir.1996), *cert. denied*, 521 U.S. 1129 (1997) ("Under the applicable law, a plaintiff who voluntarily resigned may maintain a case of constructive discharge when the employer's allegedly discriminatory conduct creates an atmosphere that is the *constructive equivalent* of a discharge.") (emphasis added) (citations omitted); *see also Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir.1987) ("When a constructive discharge is found, an employee's resignation is treated — for the purpose of establishing a prima facie case of employment discrimination — as if the employer had actually discharged the employee.").

Applying the law to the present case, it is clear that Suders has raised genuine issues of material fact relating to her claim of constructive discharge. As we noted with respect to her claim of a sexually hostile work environment, the harassment that she claimed to have endured was persistent, ongoing, and severe. Prendergast made it clear, through repeated acts of intimidation and his direct statements, that Suders was not wanted at the station. To be subjected to Baker's wrestling routine on a nightly basis, along with his and Easton's conversations of bestiality, oral sex, and genital piercing, would have been intolerable to any reasonable person. The conduct of the PA State Police officers at the McConnellsburg barracks drove Suders to draft a resignation letter.

If the harassment was limited to the type of conduct described above, we find that disputed issues of fact would have precluded summary judgment on Suders's constructive discharge claim, notwithstanding the PA State Police's argument that she failed to avail herself of an effective complaint procedure. Arguably, Suders made only one serious attempt on August 18, 1998, to resolve her problems within the remedial program established by

the PA State Police. Furthermore, the two days that she waited before resigning did not give her employer a chance to remedy the problems at the McConnellsburg barracks. Nevertheless, whether Suders's work environment was objectively intolerable and whether a reasonable person in her position would have felt compelled to resign would remain open issues.

Any shred of doubt, however, is removed when considering the events of Suders's final day on the job. Drawing all reasonable inferences in her favor, Suders presented evidence sufficient to enable a reasonable finder of fact to conclude that the officers attempted to set her up on a false charge of theft. The concealment of her test results in a set of drawers in the women's locker room, the use of theft detection powder to catch one of their own inside the station, and the excessive and humiliating treatment that Suders suffered when she was handcuffed and photographed all point to a pattern of conduct designed to find some way to terminate Suders. In that respect, the facts of this case bear a resemblance to *Levendos*, where we reversed the district court's grant of summary judgment on a claim of constructive discharge, in part, because plaintiff, a maitre d' and pastry chef, presented evidence that her employer had placed wine bottles in her locker to make it appear as if she was stealing. 860 F.2d at 1228, 1231. We also believe that this type of conduct — false charges of theft or other manufactured ploys designed to incriminate an employee — is sufficiently similar to the first and second situations identified in *Clowes*, 991 F.2d at 1161. In other words, false charges of misconduct are tantamount to threats or suggestions of discharge. Attacking someone with a false charge of theft seems a most effective way of suggesting that an employee will be fired or should leave voluntarily.

Of course, it is unclear at this stage of the litigation whether a finder of fact would ultimately conclude that

Suders had no other reasonable alternative but to resign. That is not, however, our concern in reviewing a motion for summary judgment. Based on the evidence presented, it is equally plausible that a jury would conclude that Suders suffered intolerable sexual harassment and that the officers set her up on a false theft charge. For these reasons, the District Court erred in failing to address Suders's claim of constructive discharge. We hold that Suders has raised genuine issues of material fact relating to her claim of constructive discharge that preclude the grant of summary judgment.

C. Is a Constructive Discharge a Tangible Employment Action?

Having found that a grant of summary judgment on Suders's claim of constructive discharge would have been improper, the issue remains whether the presence of the constructive discharge claim alters the balance of the District Court's judgment as to the liability of the PA State Police. Without analysis, the District Court permitted the PA State Police to assert the affirmative defense to vicarious liability and, as a result, to prevail on summary judgment. As we briefly noted at the outset of our opinion, *Ellerth* and *Faragher* hold that an employer is strictly liable to a victimized employee for the harassment or discrimination of its supervisors if the harassment or discrimination resulted in a tangible employment action. In that case, an employer is precluded from invoking the affirmative defense. If, however, the harassment or discrimination did not amount to a tangible employment action, the employer is entitled to assert the affirmative defense. It seems the District Court bypassed the critical issue in this case: whether a constructive discharge, when proved, constitutes a tangible employment action. We hold that it does.

1. *Ellerth* and *Faragher*

An understanding of the Supreme Court's decisions in *Ellerth* and *Faragher* is essential to the issues on appeal. In both cases, plaintiffs alleged that they endured near-constant sexual harassment at the hands of their supervisors. *Ellerth*, 524 U.S. at 747; *Faragher*, 524 U.S. at 780. The harassment included uninvited and offensive touching, lewd remarks, and crude propositions. Both plaintiffs also sought to hold their employers liable pursuant to Title VII for the harassment of their supervisors. Although the plaintiff in *Ellerth* had also alleged that her supervisor threatened to deny her tangible job benefits if she did not submit to his thinly-veiled demands for sexual favors, the alleged threats never materialized.[8] *Ellerth*, 524 U.S. 747-48. Therefore, despite this variance in the factual allegations, both plaintiffs stood in the same position with respect to Title VII, that is, they had properly stated claims for unlawful discrimination based on a sexually hostile work environment. *Id.* at 754 ("Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.") (citations omitted).

The issue in both cases, therefore, was "whether an employer has vicarious liability when a supervisor creates a hostile work environment...." *Id.; see also Faragher*, 524 U.S. at 780 ("This case calls for the identification of the circumstances under which an employer may be held liable under Title VII ... for the acts of a supervisory

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[8]Ellerth's allegation of a *quid pro quo* scenario was based in part on an incident in which her supervisor, while making comments about her breasts, told her to "loosen up," warning that "I could make your life very hard or very easy at Burlington." *Id.* at 748 (citations omitted).

employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination."). Before turning to its analysis, the Court noted that in the aftermath of its decision in *Meritor*, "Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees.... [And] the Courts of Appeals have adopted different approaches." *Faragher*, 524 U.S. at 785.[9] Therefore, in *Ellerth* and *Faragher*, both decided on the same day, the Court sought to delineate "a uniform and predictable standard [for vicarious liability] ... as a matter of federal law." *Ellerth*, 524 U.S. at 754.

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[9]The confusion among the Courts of Appeals was due in part to the terminology employed in *Meritor* to describe different types of Title VII sexual harassment cases. In *Meritor*, the Court distinguished cases where an employer demands sexual favors in return for job benefits from cases where sexually demeaning behavior — not necessarily constituting a demand for sexual liberties — alters the terms and conditions of employment. *Meritor*, 477 U.S. at 65; *see also Ellerth*, 524 U.S. at 752. The Court referred to the former as *quid pro quo* claims and the latter as hostile environment claims. The purpose of the distinction is simply to provide a "rough demarcation" between types of sexual harassment. *Ellerth*, 524 U.S. at 752.

The Court held that both were cognizable under Title VII, but that a plaintiff claiming a hostile work environment was required to show harassment that was severe or pervasive. *Meritor*, 477 U.S. at 67. Although the Court did not suggest that these terms should bear on the issue of vicarious liability, the categories acquired a significance of their own. Some Courts of Appeals interpreted *Meritor* to mean that vicarious liability is appropriate when a plaintiff establishes a *quid pro quo* claim. *See Ellerth*, 524 U.S. at 753 (citing cases). This development encouraged plaintiffs to state their claims as *quid pro quo* claims, when in fact, the distinction was never meant to inform the vicarious liability analysis.

In determining the scope of the vicarious liability of an employer for the sexual harassment of its supervisors, the Court turned to principles of agency law. Because the Title VII definition of "employer" includes "any agent," 42 U.S.C. § 2000e(b), the Court noted that "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles." *Ellerth*, 524 U.S. at 754. It also cautioned, however, that "common-law principles may not be transferrable in all their particulars to Title VII." *Id.* at 764 (quoting *Meritor*, 477 U.S. at 72). The appropriate starting point is the Restatement (Second) of Agency (1957) (the "Restatement"). *Meritor*, 477 U.S. at 72; *Ellerth*, 524 U.S. at 755.

The Restatement provision of direct relevance to this appeal is section 219(2),[10] which sets forth several

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[10]Before turning to § 219(2), the Court left open the possibility of a limited basis for vicarious liability in § 219(1), which states that "[a] master is subject to liability for the torts of his servants committed while acting in the *scope of their employment.*" Restatement § 219(1) (emphasis added). An action within the "scope of employment," is defined by other sections of the Restatement as one "actuated, at least in part, by a purpose to serve the [employer]." Restatement §§ 228(1)(c); *see also Ellerth*, 524 U.S. at 756-57. The Court recognized that when a supervisor commits sexual harassment, those actions generally are not actuated by a purpose to serve the employer. In fact, most employers today, it is hoped, condemn sexual harassment in the workplace, and the typical harassing supervisor acts on his or her own animus. *See id.; see also Faragher*, 524 U.S. at 793-94; *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-07 (3d Cir.1994). Nevertheless, the Court left open the possibility that "a supervisor [may] engage[ ] in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer," for instance, where an employer has a policy of discouraging women from seeking advancement. *Ellerth*, 524 U.S. at 757.

(continued...)

situations in which an employer may be vicariously liable for the torts of its employees acting solely for their own purposes:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> (a) the master intended the conduct or the consequences, or
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> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
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> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was *aided in accomplishing the tort by the existence of the agency relation.*

Restatement § 219(2) (emphasis added); *see also* Restatement § 219, Comment e. As in *Ellerth* and

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[10](...continued)
We note that the record presented in Suders's appeal does not support the inference that the PA State Police officers were acting in the scope of their employment. Therefore, § 219(1) is not relevant to this appeal as a basis for imposing vicarious liability.

We leave aside other possible bases for liability that are not relevant to Suders's appeal: cases in which the position of the harasser makes him an alter ego of the employer; and cases in which the employee reasonably, but wrongly, believes that the harasser is a supervisor. *See Durham Life Ins. Co. v. Evans,* 166 F.3d 139, 152 n. 8 (3d Cir.1999).

Faragher, Suders does not allege that the PA State Police itself intended to harass her or that there is a non-delegable duty at issue. Therefore, subsections (a) and (c) of section 219(2) are not relevant to this appeal. Section 219(2)(b) might arguably apply if Suders had alleged that the PA State Police was negligent in that it "knew or should have known about" the harassment and failed to stop it. *See Ellerth,* 524 U.S. at 759. Because she conceded that she resigned only two days after making her first formal complaint to Smith-Elliott, Suders implicitly acknowledges that the PA State Police was not aware of what had transpired at the McConnellsburg barracks, thus precluding vicarious liability under subsection (b). Finally, Suders does not allege that the PA State Police officers purported to exercise authority that they did not have, and therefore, the "apparent authority" clause of section 219(2)(d) is also inapplicable here.

Thus, as in *Ellerth* and *Faragher,* vicarious liability must be premised on the second clause of section 219(2)(d), which provides for the vicarious liability of an employer for the tortious acts of an employee when the latter is "aided in accomplishing the tort by the existence of the agency relation." This has come to be known as the "aided in the agency relation standard." *Ellerth,* 524 U.S. at 759. In the context of Title VII, the Supreme Court recognized that "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here." *Faragher,* 524 U.S. at 802.

While the Court found an appropriate starting point in the aided in the agency relation standard, it also recognized an inherent definitional problem: broadly

speaking, most workplace harassment occurs because men and women are brought together as co-workers in close quarters. In that sense, all harassment is aided by the agency relationship put in place by employers. The Court cautioned that "[w]ere this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all *co-worker* harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue." *Ellerth*, 524 U.S. at 760 (emphasis added). In that regard, it is important to note the clear limitations of the aided in the agency relation standard as a basis for vicarious liability. Specifically, the Supreme Court recognized, and we reiterate here, a clear distinction between supervisors and co-workers. This recognition derives from the simple fact that, for purposes of liability, only supervisors, because of the authority vested in them by their employers and because of the rank they possess over others, may be aided by the agency relation in the commission of actionable harassment.[11]

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[11] *See Faragher*, 524 U.S. at 803. The Court noted that "[r]ecognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." *Id.*
In addition to the special relationship between employers and supervisors, harassment by a supervisor takes on different dimensions than harassment by a co-worker: "When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose 'power to supervise'-[which may be] to hire and fire, and to set work schedules and pay rates-does not disappear ... when he chooses to harass through
(continued...)

The distinction between supervisors and co-workers is a crucial limitation worth reiterating, but by design, it simply precludes vicarious liability under the aided in the agency relation standard for a category of would-be harassers, co-workers. The distinction does not fundamentally alter the breadth of § 219(2)(d) as written. Without further qualification, the aided in the agency relation standard risks holding the employer "automatically" liable for a supervisor's harassment without regard to the nature of the supervisor's conduct, a result that the Court forbade in *Meritor*, 477 U.S. at 72. *See also Faragher*, 524 U.S. at 804. Therefore, the Court found that in order to impose vicarious liability on an

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[11] (...continued)
insults and offensive gestures rather than directly with threats of firing or promises of promotion." *Id.* (citing Estrich, *Sex at Work*, 43 STAN. L.REV. 813, 854 (1991)).

At oral argument, the PA State Police contended that none of the individual officers had the requisite authority to commit a tangible employment action because they could not discharge or demote Suders. We reject this attempt to rein in the scope of a supervisor within the meaning of *Ellerth* and *Faragher*. The record in this case clearly reflected that (1) Easton was responsible for the day-to-day supervision of the McConnellsburg barracks; and (2) both Baker and Prendergast had supervisory duties with respect to "running [their] shift[s]." App. at 215. No more is required to raise a genuine issue of material fact as to their supervisory authority.

We are not persuaded, however, that the actions of Smith-Elliot amounted to actionable harassment. Her supervisory authority over Suders was not clearly established in the record below. Although her conduct is relevant, especially to the affirmative defense, we strain to see how it alone substantiates a claim under Title VII. Nevertheless, in light of our remand, these issues may be addressed on the merits.

employer under the aided in the agency relation standard, "something more" would be required. *Ellerth*, 524 U.S. at 760.[12] The Court's resolution of this question reflects an intricate balance incorporated into a complex rule of law with multiple components.

First, the Court identified a class of supervisory actions for which more than the mere existence of the agency relation is unquestionably required for the commission of the alleged harassment: "when a supervisor takes a tangible employment action against the subordinate." *Id.* When a supervisor's actions result in a tangible employment action, the employer shall be strictly liable for the actionable harassment of its supervisors, without regard to an affirmative defense. *Id.* at 765; *Faragher*, 524 U.S. at 808.

The Court's discussion of the attributes of a tangible employment action is critical to the present appeal. In broad strokes, a tangible employment action "constitutes a significant change in employment status." *Ellerth*, 524 U.S. at 761. A tangible employment action is also defined by reference to a non- exclusive list of representative workplace actions, "*such as* hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761 (emphasis added); *see also Faragher*, 524 U.S. at 790. In most cases, but not always, "a tangible employment action ... inflicts direct economic

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[12] *See also Faragher*, 524 U.S. at 797 ("The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement ..., but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view.").

harm." Finally, a tangible employment action implicates, in some meaningful way, the authority of the employer itself: "A tangible employment decision requires an official act of the enterprise, a company act. The decision *in most cases* is documented in official company records, and may be subject to review by higher level supervisors.... The supervisor *often must* obtain the imprimatur of the enterprise and use its internal processes." *Ellerth*, 524 U.S. at 762 (emphases added).

Second, when a supervisor's harassment does not amount to a tangible employment action, the Court found it unclear whether the aided in the agency relation standard should support vicarious liability. In that regard, we noted above that the risk of holding the employer "automatically" liable for the acts of its supervisors was too great. *Id.* at 763 ("[W]e are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment.")(citations omitted). Nevertheless, for actions that fall short of a tangible employment action, but would otherwise be actionable under Title VII, the Court did not give employers a free pass from liability. In cases where a supervisor's harassment does not result in a tangible employment action, the Court made available to employers an affirmative defense, an approach designed to further the well-recognized Title VII goals of encouraging anti-harassment policies and effective mechanisms for addressing employee complaints. *See id.* at 764; *Faragher*, 524 U.S. at 806.

Therefore, in both *Ellerth* and *Faragher*, the Court adopted the following holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

2. The Aftermath of *Ellerth* and *Faragher* and the Issue of Constructive Discharge in the Courts of Appeals

In light of the Supreme Court's guidance in *Ellerth* and *Faragher*, we reach the critical issue in this case: when a supervisor's harassment culminates in a constructive discharge, as Suders persuasively supported in her opposition to the motion for summary judgment, may her employer assert the affirmative defense to liability? As our analysis above demonstrates, the issue may be reduced more simply to whether a constructive discharge constitutes a tangible employment action. We recognize that constructive discharge did not appear in either the Supreme Court's discussion pertaining to what constitutes a tangible employment action or the list of representative employment actions. This absence is not dispositive, however, as a claim of constructive discharge was not before the Court in either of the two cases. Therefore, the principles underlying a tangible

employment action, together with the relevant agency and Title VII concerns, should guide our inquiry.

The PA State Police argues on appeal that a constructive discharge does not constitute a tangible employment action and that its position is supported by case law from other jurisdictions. We recognize a division among the Courts of Appeals as to this issue. A survey of the courts that have addressed the issue reveals a number of different approaches.

The PA State Police correctly notes that the Court of Appeals for the Second Circuit has held that a "constructive discharge does not constitute a 'tangible employment action,' as that term is used in *Ellerth* and *Faragher*." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). In *Caridad*, the court based its decision on three grounds. First, the court noted that "[c]o-workers, as well as supervisors can cause the constructive discharge of an employee." *Id.* Second, "unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer," *id.*, which would seem to contravene the Supreme Court's observation in *Ellerth*, that a tangible employment generally requires a "a company act." 524 U.S. at 762. Third, the Second Circuit suggested that in *Ellerth*, the Supreme Court implicitly addressed the issue of constructive discharge and that its holding does not permit the conclusion that such action constitutes a tangible employment action:

> Moreover, the facts of *Ellerth*, where the plaintiff, like Caridad, did not complain of the harassment prior to quitting her job, indicate that constructive discharge is not a tangible employment action depriving the employer of the availability of the affirmative defense to Title VII liability. Ellerth alleged that she had been

> constructively discharged as a result of sexual harassment by her supervisor ...; in remanding the case for a determination of whether the employer could make out an affirmative defense, the Supreme Court noted that 'Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor].[13] *Caridad,* 191 F.3d at 294-95 (citations omitted).

Recently, the Court of Appeals for the Sixth Circuit, in an unpublished opinion, has adopted the holding in *Caridad* that a "claim of constructive discharge is not a tangible employment action for purposes of *Faragher* and *Burlington.*" *Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 WL 924599, at *1 (6th Cir. June 26, 2000); *see also*

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[13]We believe that the particular factual circumstances in *Caridad* shed some light on the court's decision there and distinguish that case from the present. Plaintiff in that case had consulted defendant's Director of Affirmative Action. She told the Director that she was being sexually harassed, without telling him the details of any incidents. The Director responded that it would be impossible to take further action without the details of the sexual harassment to which she alluded. Even still, the Director offered to transfer plaintiff to another shift, but she declined this and the offer to investigate further.

The court underscored plaintiff's reluctance to take advantage of the remedial measures in place, noting that plaintiff "did not complain of the harassment prior to quitting her job," thus indicating that "a constructive discharge is not a tangible employment action." *Caridad,* 191 F.3d at 294. We believe that all of these probative facts as to plaintiff's failure to provide details and to cooperate with the Director are clearly relevant, but more to the issue of whether there was a constructive discharge in the first place. We do not believe that these facts should bear upon the question of whether a constructive discharge would constitute a tangible employment action.

Keaton v. State of Ohio, No. C2-00- 1248, 2002 WL 1580567, at *9 (S.D.Ohio June 3, 2002).[14] In addition, other district courts aligning themselves with the Second Circuit have rejected the notion that a constructive discharge constitutes a tangible employment action on other grounds. For instance, in *Powell v. Morris,* the court held that a constructive discharge is not a tangible employment action because if the Supreme Court had intended to include constructive discharge, it "could have easily listed 'constructive discharge' along with the other incidents as constituting a tangible employment action." 37 F.Supp.2d 1011, 1019 (S.D.Ohio 1999).

In contrast to the Second and Sixth Circuits, the Court of Appeals for the Eighth Circuit held that a constructive discharge, when proved, would constitute a tangible employment action. *See Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) ("The district court did not err in its instruction, since a constructive discharge constitutes a tangible employment action which prevents an employer from utilizing the affirmative defense.")(citations omitted); *Jackson v. Arkansas Dep't of Ed.*, 272 F.3d 1020, 1026 (8th Cir. 2001) ("If [plaintiff] was in fact constructively discharged, then the constructive discharge would constitute a tangible employment action and prevent the [defendant] from utilizing the affirmative defense."), *cert. denied,* 536 U.S. 908 (2002). The Eighth Circuit, however, did not address the rationales advanced by the Second Circuit in *Caridad.*

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[14]Several district courts have also adopted the holding in *Caridad* for substantially the same reasons advanced by the Second Circuit. *See Scott v. Ameritex Yarn,* 72 F.Supp.2d 587, 594 (D.S.C. 1999); *Desmarteau v. City of Wichita, Kansas,* 64 F.Supp.2d 1067, 1079 (D.Kan. 1999); *Alberter v. McDonald's Corp.*, 70 F.Supp.2d 1138, 1147 (D.Nev. 1999).

Among the district courts, the leading case for the position contrary to *Caridad* is *Cherry v. Menard, Inc.*, 101 F.Supp.2d 1160 (N.D.Iowa 2000). In a well-reasoned decision, the United States District Court for the Northern District of Iowa, presented a compelling counterpoint to the Second Circuit's decision in *Caridad*. In *Cherry*, the court found that "none of [the] reasons [advanced in *Caridad*] stands up to a probing scrutiny," and that "the court is not persuaded by [defendant's] argument, that a constructive discharge does not constitute a 'tangible employment action' as defined in *Ellerth/Faragher.*" *Id.* at 1171, 1176.

Other district courts have followed *Jaros* and *Cherry*. *See Vasquez v. Atrium Door & Window Co. of Arizona, Inc.*, 218 F.Supp.2d 1139, 1142 (D.Ariz. 2002) ("After careful consideration of the issue, the Court finds that a constructive discharge constitutes a tangible employment action."); *Haworth v. Romania Imported Motors, Inc.*, No. CV 00-1721, 2001 WL 34041893, at *8 (D.Or. Dec.27, 2001) ("Under the reasoning provided by the Supreme Court in *Ellerth/Faragher*, constructive discharge constitutes a tangible employment action as the Court contemplated the term."); *Taylor v. United Regional Health Care System, Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803, at *6 (N.D.Tex. Aug.14, 2001) ("[C]onstructive discharge and a failure to promote are 'tangible employment actions' for the purposes of Title VII.").

Other Courts of Appeals have noted the issue, but expressly declined to rule on it. *See Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 n. 8 (9th Cir. 2001) ("We have not yet determined whether a constructive discharge is a tangible employment action.... We do not reach this issue in this case because Kohler has waived her constructive discharge claim."); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 666-667 (7th Cir.) ("First, it

should be noted that we have yet to determine whether a constructive discharge is a tangible employment action within the meaning of *Ellerth* and *Faragher*. ... However, we need not settle that issue today, for we find that [plaintiff] did not raise a genuine issue of material fact that she was constructively discharged.") (citations omitted), *cert. denied*, 534 U.S. 1041 (2001).

3. A Constructive Discharge, When Proved, Constitutes a Tangible Employment Action within the Meaning of *Ellerth* and *Faragher*

Although we are cognizant of this wide divergence of views among the Courts of Appeals, we disagree with the PA State Police's argument that a constructive discharge is not a tangible employment action. Our decision is based on the following observations: (1) although we have not definitively ruled on the issue, our recent decisions have suggested that a constructive discharge constitutes a tangible employment action; (2) none of the grounds advanced by the *Caridad* line of cases persuades us that a constructive discharge should not be held to constitute a tangible employment action; and (3) holding an employer strictly liable for a constructive discharge resulting from the actionable harassment of its supervisors more faithfully adheres to the policy objectives set forth in *Ellerth* and *Faragher* and to our own Title VII jurisprudence.

At the outset, we note that although the present appeal marks the first time that we definitively address the issue of constructive discharge within the framework of *Ellerth* and *Faragher*, we are not writing on a blank slate. In *Cardenas v. Massey*, 269 F.3d 251, 266-67 (3d Cir. 2001), plaintiff alleged that he was subjected to a racially hostile work environment, resulting in his constructive discharge. In reversing the grant of summary judgment on plaintiff's hostile work environment claim,

we noted that "[i]f Cardenas convinces a jury that he was victimized by a hostile work environment created by [defendants], it is certainly possible that the same jury would find that the hostile environment was severe enough to have precipitated Cardenas' resignation, i.e., a constructive discharge." *Id.* We also recognized that "[t]here appears to be some disagreement on whether constructive discharge constitutes a tangible employment action." *Id.* at 267 n. 10. Nevertheless, we felt that in light of the particular facts and circumstances in *Cardenas*, the better result was to "leave this issue to the District Court in the first instance. For purposes of this discussion, we assume a constructive discharge is a tangible employment action." *Id.*

In addition, in *Durham Life*, 166 F.3d at 149 n. 5, plaintiff also alleged sexual harassment and a constructive discharge. In that case, a majority of the panel was achieved by the concurrence of two of our colleagues. In discussing the reasons for the different perspectives of the panel members, the Court noted that "[Plaintiff] was the subject of a tangible adverse employment action, the District Court found that her supervisors were responsible for her constructive discharge and the District Court returned a verdict compensating her for the damages she suffered." *Id.* Furthermore, we suggested in clear terms that a constructive discharge would constitute a tangible employment action: "In a case such as this one, where [plaintiff] was constructively discharged by her supervisors' action after their own actionable behavior, the holdings and instruction of *Ellerth* and *Faragher* are clear: the employer, Durham Life Insurance Company, is automatically liable and no affirmative defense is

available."[15] *Id.* Despite this clear suggestion, our holding in *Durham Life* was ultimately based on employment actions unrelated to the constructive discharge — that is, we found that plaintiff had met her burden at trial of demonstrating a tangible employment action based on, *inter alia*, evidence that her supervisor had (1) dismissed her secretary; (2) removed files from her office which were vital to her work; and (3) allocated a disproportionate share of less lucrative assignments to her. *Id.* at 153-54. Therefore, notwithstanding the suggestions in *Cardenas* and *Durham Life*, one court noted in April 2002, that as to the issue of whether a constructive discharge constitutes a tangible employment action, "the Third Circuit explicitly has declined to resolve this issue." *Evans v. Nine West Group, Inc.*, No. CIV. A. 00-4850, 2002 WL 550477, at *9 (E.D.Pa. Apr.15, 2002). We seek to resolve this issue today and to elaborate on the statements that we have already made as to the significance of a constructive discharge in the *Ellerth* and *Faragher* analysis.

In addition to our earlier suggestions in *Cardenas* and *Durham Life*, we are not persuaded that the grounds advanced in the *Caridad* line of cases compel the holding that a constructive discharge does not constitute a tangible employment action. We address first the argument in *Powell*, 37 F.Supp.2d at 1019, that there is some meaning in the Supreme Court's exclusion of

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[15]We also stated that "[u]nder Durham's theory, any substantial adverse action, such as a demotion in authority and pay, would not be a tangible adverse employment action if it led the affected employee to quit before the demotion took effect. This is contrary to Title VII doctrine, which recognizes a constructive discharge under such circumstances." *Durham Life*, 166 F.3d at 153.

constructive discharge from the list of representative tangible employment actions. We disagree.

The Supreme Court made it clear that it intended to provide a non-exclusive list of clear cases of tangible employment actions, on the one hand, and broader categories, on the other. The Supreme Court stated that a "tangible employment action constitutes a significant change in employment status, *such as* hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth* 524 U.S. at 761 (emphasis added). Several aspects of this definition support our conclusion that it was intended to be non-exhaustive. As other courts have noted, the use of the qualifier "such as" indicates that tangible employment actions are not limited to those that follow the qualifier. *See Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 93 (2d Cir. 2002); *Cherry*, 101 F.Supp.2d at 1175; *Vasquez*, 218 F.Supp.2d at 1142-43. In addition, we observe that the list begins with specific actions that could constitute a tangible employment action — hiring, firing, and failing to promote — and ends with broader categories that could describe many different workplace actions — reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. By employing this structural technique, the Supreme Court recognized a simple reality of harassment in the modern workplace: tangible employment actions often take the form of subtle discrimination not easily categorized as a formal discharge or demotion.

Also, for the proposition that a tangible employment action is a flexible concept, not limited to the actions mentioned in *Ellerth*, we need look no further than our recent decision in *Durham Life*. There, as described above, we determined that a tangible employment action

resulted where a supervisor (1) dismissed an employee's secretary, (2) removed her essential work files, and (3) allocated to her a disproportionate share of less lucrative assignments. *See Durham Life*, 166 F.3d at 153-54. Of course, none of these actions appear in the list set forth in *Ellerth*, which is entirely consistent with our finding that the Supreme Court intended to set forth a non-exclusive list of representative actions. *See id.* at 144 ("The concept of a tangible adverse employment action is not limited to changes in compensation, although Evans's pay was certainly affected by the actions taken against her. 'Tangible adverse employment action' includes the loss of significant job benefits or characteristics, such as the resources necessary for an employee to do his or her job....").

Next, we address the court's reasoning in *Caridad* that the Supreme Court implicitly addressed and rejected constructive discharge as falling within the ambit of a tangible employment action. The court's reasoning was based on the fact that although plaintiff in *Ellerth* had initially alleged a claim of constructive discharge, the Supreme Court concluded that "[plaintiff] has not alleged she suffered a tangible employment action at the hands of [her supervisor]." *Ellerth*, 524 U.S. at 766. Based on our review of the procedural history of the case, however, we find that the claim of constructive discharge was never before the Court when it ruled. While it is true that plaintiff initially pleaded a claim of constructive discharge, the trial judge granted summary judgment as to that claim, noting that "it can not be said that [defendant] made [plaintiff's] working conditions intolerable forcing her into an involuntary resignation." *Ellerth v. Burlington Industries, Inc.*, 912 F.Supp. 1101, 1124 (N.D.Ill. 1996). When the matter reached the Seventh Circuit, the focus of the appeal was limited to plaintiff's claims of *quid pro quo* harassment and hostile environment harassment. *See Jansen v. Packaging Corp.*

of America, 123 F.3d 490, 494 (7th Cir. 1997) (*en banc*) (consolidated with *Ellerth*).

By the time the matter reached the Supreme Court, the issues had narrowed even further: "The question presented on certiorari is whether [plaintiff] can state a claim of *quid pro quo* harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for [defendant's] alleged misconduct, rather than liability limited to its own negligence." *Ellerth*, 524 U.S. at 753. Simply put, plaintiff's claim of constructive discharge was never before the Supreme Court and, in fact, the Seventh Circuit barely addressed it. *See Cherry*, 101 F.Supp.2d at 1174. Our conclusion is supported by the fact that constructive discharge does not appear anywhere in the Supreme Court's analysis. Therefore, we agree with the court in *Cherry*, that "the *Ellerth* decision left entirely open the question of whether a constructive discharge resulting from conduct of a supervisor can constitute the sort of 'tangible employment action' that deprives an employer of the *Ellerth/Faragher* defense." *Id.* at 1175.

In addition, the court in *Caridad* held that because "[c]o-workers, as well as supervisors, can cause the constructive discharge of an employee," it should not be construed as a tangible employment action. 191 F.3d at 294. This observation is beside the point. The Supreme Court recognized that many tangible employment actions may be perpetrated by either supervisors or co- workers. After all, supervisors and co-workers alike can make obscene gestures, lewd comments, sexual propositions, or steal another employee's clients. For the sake of recognizing reasonable limits to the aided in the agency relation standard, however, the Supreme Court made the categorical distinction between co-workers and supervisors and imposed vicarious liability only with respect to the actions of the latter. Furthermore, the

Court noted that most, but not all, tangible employment actions are usually committed by supervisors. *Ellerth*, 524 U.S. at 762 ("As a *general proposition*, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.") (emphasis added). It is of no consequence that constructive discharge may be caused by a co-worker because we are only concerned here with that which is caused by a supervisor. And in that regard, our inquiry is not whether an action may be caused by a co-worker or supervisor, it is whether the supervisor's action constitutes a "significant change in employment status." *Id.* at 761.[16]

We turn to the final rationale advanced by the court in *Caridad*, the notion that, unlike termination or demotion, constructive discharge is not ratified by the employer. It is true that in a constructive discharge situation, it is the employee who ultimately decides that he or she has no alternative but to resign. In that sense, as regards the specific event which terminates the employer-employee relationship, a constructive discharge

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[16]As the court observed in *Cherry*, this argument "appears to be backwards: The panel in *Caridad* reasoned that a 'tangible employment action' must be a harm that only a supervisor can inflict, when the Supreme Court defined a 'tangible employment action' in terms of the harm it can inflict, observed that ordinarily, but not exclusively, only a supervisor can inflict such harm ..., and then concluded that the 'aided in the agency relation' standard 'will always be met when a supervisor takes a tangible employment action against a subordinate.' Consequently, this court concludes that, under the Supreme Court's definition, it is the *nature of the harm* inflicted by a supervisor — that is, 'a significant change in employment status' or 'inflict[ion] of a direct economic harm' — that determines whether the supervisor's action is a 'tangible employment action,' not whether a co-worker could also inflict such harm." 101 F.Supp.2d at 1172-73 (citations omitted).

may not bear the "imprimatur of the enterprise," *Ellerth*, 524 U.S. at 762, in the same way as a formal termination. We are not persuaded, however, that this distinction compels the conclusion that a constructive discharge is not a tangible employment action.

First, this view contravenes the fundamental principle of our jurisprudence that a constructive discharge, when proved, operates as the functional equivalent of an actual termination. *Sheridan*, 100 F.3d at 1075 (finding that a constructive discharge is the "constructive equivalent of a [formal] discharge"). This principle recognizes that when a plaintiff-employee successfully demonstrates that the work environment created by an employer was so intolerable that he or she had no choice but to resign, the constructive discharge becomes, for all intents and purposes, the act of the employer. There are sound reasons for adopting this legal construct. For instance, when a plaintiff-employee meets the stringent test of showing a constructive discharge, the direct economic harm suffered is identical to that of a formally discharged employee. *Cherry*, 101 F.Supp.2d at 1173 ("constructive discharge constitutes precisely the same sort of 'significant change in employment status' and inflicts precisely the same sort of 'economic harm' as any other 'firing.' "); *see also Vasquez*, 218 F.Supp.2d at 1142-43.

In addition, to the extent that *Caridad* suggested that only an action ratified by the employer and documented in official records qualifies as a tangible employment action, we disagree. As another panel of the Second Circuit noted: "though a tangible employment action 'in *most* cases is documented in official company records, and *may* be subject to review by higher level supervisors,' the Supreme Court did not require such conditions in all cases." *Jin*, 310 F.3d at 98 (emphases in original) (quoting *Ellerth*, 524 U.S. at 762). As we noted above, tangible employment actions defy neat categories and an attempt

to list them all would be futile. They occur within the context of each unique factual situation. Therefore, we agree that tangible employment actions are often ratified by an employer, and we should look first to official company records for relevant evidence. But by no means is a tangible employment action precluded solely because no documentation of a company act exists. *Ellerth*, 524 U.S. at 762.

In fact, in other Title VII contexts, courts have explicitly recognized that some of the most pernicious forms of workplace harassment, clearly amounting to tangible employment actions, are often not accompanied by official company acts. This is especially true in *quid pro quo* cases where a victimized employee submits to a supervisor's demands for sexual favors in return for job benefits, such as continued employment. In these cases, it is rare that a supervisor's demands for sexual liberties, and the corresponding threat of adverse consequences for failure to submit, will be documented anywhere in company records. Therefore, a rule requiring a victimized employee who submits to a supervisor's indecent demand for sexual favors to prove an official company act in order to establish a tangible employment action strains common sense. As the Second Circuit has held, the more sensible approach in the *quid pro quo* context is to recognize that, by his or her actions, a supervisor invokes the official authority of the enterprise:

> Finally, MetLife relies on a statement in *Ellerth* that "a tangible employment decision requires an official act of the enterprise, a company act." But, assuming Jin's allegations to be true, Morabito's use of his supervisory authority to require Jin's submission was, for Title VII purposes, the act of the employer. This is because Morabito brought "the official power of the enterprise to bear" on Jin by explicitly threatening to

fire her if she did not submit and then allowing her to retain her job based on her submission.

Jin, 310 F.3d at 98 (citations omitted).

This rationale is equally applicable in the context of constructive discharge. By focusing on the actions of a supervisor and on the type of injury to a plaintiff, it becomes clear that when a supervisor creates a hostile work environment so severe that an employee has no alternative but to resign, the official power of the enterprise is brought to bear on the constructive discharge.[17] In that regard, we find no sound justification for requiring more in constructive discharge cases than in *quid pro quo* cases in order to find a tangible employment action: an employee's constructive discharge is no more unilateral an act of the victimized employee and no less coerced by the employer than submission to sexual advances in a *quid pro quo* situation. Therefore, we reject any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action.

In any event, we note that, as a practical matter, a constructive discharge is often ratified by the employer. In the appeal of *Ellerth* to the Seventh Circuit, Chief Judge Posner remarked in his concurring opinion that "[t]he difficult borderline case is that of constructive termination precipitated by a threat. The termination will

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[17] *See generally* Kerri L. Bauchner. *From Pig in a Parlor to Boar in a Boardroom: Why Ellerth Isn't Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 331-32 (1999) (advocating a competing interests approach to sexual harassment cases which would give due regard to the injury suffered by a plaintiff).

look to the supervisor's superiors like a voluntary quit. But since there is *always some paperwork involved in an employee's quitting*, the higher-ups in the company will have some ability to monitor constructive discharges, and I would therefore impose *strict liability* in such cases." *Jansen*, 123 F.3d at 515 (emphases added). The present case is a perfect illustration of this proposition. While it is true that Baker's repetition of the wrestling move five to ten times per evening might not be reflected in official PA State Police records, the circumstances of the allegedly false charge of theft are quite likely to be detailed in documents. Suders was handcuffed, photographed, and detained as a suspect, events that surely leave a paper trail. At a trial on the merits, the significance of these documented events may be judged by weighing Suders's testimony against that of the PA State Police officers. Thus, the documents surrounding Suders's departure may indeed reflect the imprimatur of the PA State Police to the extent that its supervising officers were trying to force Suders to quit, and we believe that she should have the opportunity to prove that. Moreover, because a constructive discharge will necessarily involve the termination of an employment relationship, the employer will be on notice and have the opportunity to determine the cause of the separation from employment. This too may be an appropriate line of inquiry for trial.

For these reasons, we are not persuaded by any of the grounds advanced by the *Caridad* line of cases for the proposition that a constructive discharge does not constitute a tangible employment action.

Lastly, we find that placing a constructive discharge within the rubric of tangible employment actions more faithfully adheres to the Supreme Court's guidance in *Ellerth* and *Faragher* and to our Title VII jurisprudence. At the outset, we reiterate that when a plaintiff-employee

satisfies his or her burden of proving a constructive discharge, we view the resignation as the functional equivalent of an actual termination. *See Sheridan*, 100 F.3d at 1075. As noted above, we have not found any sound justifications for treating a constructive discharge differently from an actual termination in the tangible employment action analysis.

As we also noted above, a constructive discharge has, in most critical respects, the primary attributes of a tangible employment action, as defined in *Ellerth* and *Faragher*. In the same way as a formal discharge, a constructive discharge "constitutes a significant change in employment status," by ending the employer-employee relationship. *Ellerth*, 524 U.S. at 761. A constructive discharge also inflicts the same type of "direct economic harm." *Id.* at 762; *see also Cherry*, 101 F.Supp.2d at 1173; *Vasquez*, 218 F.Supp.2d at 1143.

Turning to our Title VII jurisprudence, we noted in *Andrews* that "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.... Such an objective can only be achieved if women are allowed to work without being harassed. Women who know that they will be subject to harassment will be deterred from joining the work force or accepting certain jobs."[18] 895 F.2d at 1483. We also recognized that, "[r]egrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination

[18]*See also Faragher*, 524 U.S. at 805-06 (noting that primary purpose of Title VII is not to provide redress, but rather to avoid harm). This purpose served as the basis for making an affirmative defense available to an employer in the absence of a tangible employment action.

continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms." *Aman*, 85 F.3d at 1081-82. In light of both the policies and the realities of workplace discrimination, we have always been mindful of the consequences and the intricate balance of incentives when adopting rules in the context of Title VII. *See Durham Life*, 166 F.3d at 154 (holding that requiring plaintiffs to report the first instance of discriminatory conduct "would have the perverse effect of putting a greater burden on plaintiffs who had extensive evidence of discrimination."); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 544 (1999) ("Applying the Restatement of Agency's 'scope of employment' rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs."); *Robinson v.. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (noting that the "exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC.").

In that regard, we emphasize that removing constructive discharge from the category of tangible employment actions could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment. When confronted with allegations of sexual harassment, employers have a wide range of options, including terminating the offending supervisor or stepping in and removing the victim from the hostile work environment by, for example, a transfer. But as our ever expanding Title VII caseload shows, there are instances when employers ignore these two alternatives and opt instead to either turn a blind eye or let their internal procedures run their course while the hostile work environment remains unchanged. With these realities in

mind, if we were to hold that a constructive discharge does not constitute a tangible employment action, employers would undoubtedly catch on to the availability of the affirmative defense even if the victimized employee resigns from objectively intolerable conditions at work. Under such a rule, the temptation of employers to preserve their affirmative defense would be overwhelming in many situations. Some employers might wish for an employee to quit voluntarily; others might even tacitly approve of increased harassment to achieve that result. In any event, the benefits of stepping in to remedy the hostile work environment are measurably cloudier.

These are exactly the sorts of incentives that courts should take pains to avoid. If anything, our decision should be guided by the paramount policy objectives set forth in *Ellerth* and *Faragher:* "to prevent sexual harassment from occurring ... [by] informing employees of their right to raise and how to raise the issue of harassment," and "to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." *Faragher,* 524 U.S. at 806 (quotations and citations omitted). By holding that a constructive discharge constitutes a tangible employment action, we effectively encourage employers to be watchful of sexual harassment in their workplaces and to remedy complaints at the earliest possible moment; otherwise, they risk losing the benefit of the affirmative defense should victimized employees feel compelled to resign.

Nor do we believe that our holding today discourages responsible behavior on the part of victimized employees. Because of the stringent test for proving constructive discharge, as set forth in part III.B, *supra,* it is highly unlikely that employees will walk off the job at the first sign of harassment and expect to prevail under Title VII. Because plaintiffs are expected to show intolerable conditions and reasonable responses to the alleged

harassment, the strategy of resigning and then mixing constructive discharge with Title VII claims will ultimately fail in the absence of a *genuine* constructive discharge situation.

For the reasons set forth above, we hold that a constructive discharge, when proved, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher.* With respect to her appeal, we hold that, because Suders raised genuine issues of material fact as to her claim of constructive discharge, the PA State Police is precluded from asserting the affirmative defense to liability advanced in support of its motion for summary judgment. These issues require a trial on the merits. Should Suders persuade the finder of fact that she was constructively discharged, the PA State Police shall be strictly liable for any actionable hostile environment. If Suders does not prevail on her claim of constructive discharge, the PA State Police may be entitled to invoke the affirmative defense. In any event, we will reverse the District Court's grant of summary judgment and remand for a disposition on the merits in accordance with our opinion.

IV.

In summary, we concur with the District Court insofar as it held that Suders had raised genuine issues of material fact as to her claim of a sexually hostile work environment in violation of Title VII. Nevertheless, the District Court improperly granted summary judgment in favor of the PA State Police on the basis of the affirmative defense in *Ellerth* and *Faragher.* Specifically, we hold that the District Court erred in failing to address Suders's claim of constructive discharge. On the basis of the record presented to the trial court, we hold that Suders raised genuine issues of material fact as to her claim of constructive discharge. Finally, we hold that a

constructive discharge, when proved in accordance with the requirements set forth above in part III.B, *supra*, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*. This precludes the PA State Police's assertion of the affirmative defense in its motion for summary judgment.

In closing, we are cognizant of the possibility that our decision today may raise thorny evidentiary issues in the trial courts. In part III.B, *supra*, we noted that a plaintiff alleging a constructive discharge must establish the convergence of two factors: (1) harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; and (2) the employee's decision to resign was reasonable under the circumstances. As to the second factor, whether the employee explored alternative avenues to resolve the alleged harassment may be relevant, although a failure to do so may not prove fatal to the employee's claim. Conceivably, then, it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs. These are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*.

The difficulty is that once a plaintiff proves a tangible employment action by establishing a constructive discharge, *Ellerth* and *Faragher* unequivocally hold that the employer is strictly liable for any actionable harassment without regard to the affirmative defense. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. Therefore, at the point at which a constructive discharge is proved, the considerations pertaining to the affirmative defense become irrelevant. *Durham Life*, 166 F.3d at 149

("Although Durham presents extensive evidence and argument about its antiharassment policies, we find that they are *not relevant* to this case because Evans's supervisors took *tangible adverse employment action* against her.") (emphasis added). Consequently, there is a substantial risk that the test for constructive discharge may become a back door for the introduction of evidence amounting to the assertion of the affirmative defense to liability.

In a similar context, we noted the problems inherent in such a counterfactual inquiry. Defendant in *Durham Life* argued that, even assuming plaintiff could prove a tangible employment action, the victimized employee should have reported the first instance of harassment, which would have allowed it to investigate and remedy the problem. 166 F.3d at 154. In response, we stated:

> [W]e decline to investigate whether, if Evans had complained early on, the sexual harassment policy at Durham would have prevented the tangible adverse actions that occurred afterwards. The difficulty of making such a counterfactual inquiry counsels against injecting this question into already-complex discrimination cases.... [W]ere we to allow an affirmative defense every time an employer could argue that the plaintiff had some non-tangible notice of discrimination *before* adverse action was taken against her, the *Ellerth/Faragher* distinction between cases with tangible adverse action and cases without such action would become hopelessly confused.

Id. (emphasis in original).

In the context of constructive discharge cases, however, there may be instances where District Courts have to engage in this complex inquiry. It is difficult to generalize about constructive discharge cases. The

comparative merit, quantum of proof, and factual setting will differ markedly from case to case. Discovery and trial testimony may reveal any of the following: substantial proof of constructive discharge, the absence of an effective remedial program,[19] or an otherwise effective antiharassment program that failed to address a particular plaintiff's complaints. In those cases, courts should carefully weigh the relevance of evidence relating to an employer's antiharassment program, in light of our observations in *Durham Life*.

Conversely, the evidentiary record may reveal scant support for a constructive discharge; or the evidence, while falling short of compelling, may raise genuine issues of material fact relating to the constructive discharge. In those cases, some evidence regarding an employer's antiharassment program or an employee's response to the alleged harassment may be admissible for the limited purpose of determining whether a constructive discharge has occurred.

In the final analysis, we rely on the wisdom and expertise of trial judges to exercise their gatekeeping authority when assessing whether all, some, or none of the evidence relating to employers' antiharassment programs and to employees' exploration of alternative

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[19] *See Faragher*, 524 U.S. at 808 ("While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Simpson.... Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisor's harassing conduct.").

avenues warrants introduction at trial. Of course, there may be instances when some evidence of this kind is admitted, yet the plaintiff ultimately prevails on a constructive discharge claim. In these cases, instructions to the jury regarding the admissibility of such evidence for limited purposes may cure any harm caused by its earlier introduction. Clear and concise jury verdict forms may also diminish the risk of confusion. Although these are complex issues, they are similar in kind to admissibility questions that trial judges are asked to decide on a regular basis.

For the reasons set forth above, we will reverse the judgment of the District Court as to Suders's Title VII claim against the PA State Police, and we will remand the case for a disposition of that claim on the merits consistent with our opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY DREW SUDERS, Plaintiff	:	
v.	:	CIVIL NO. 1:CV-00-1655
ERIC D. EASTON; WILLIAM D. BAKER; ERIC B. PRENDERGAST; VIRGINIA SMITH ELLIOTT; and THE PENNSYLVANIA STATE POLICE, Defendants	:	

MEMORANDUM

Before the court is Defendants' motion for summary judgment. The parties have briefed the issues, and the motion is ripe for disposition.

I. Background

The following facts are undisputed except where noted:[1] Plaintiff, Nancy Suders, became employed by

[1]Plaintiff's brief in opposition to Defendants' motion for summary judgment contains various facts which are not included in Plaintiff's Counterstatement of Disputed Material Facts. Furthermore, the additional facts included in Plaintiff's opposition brief do not contain any citations to the record. Accordingly, the court will not take such facts into consideration, and will only rely upon facts for which Plaintiff (continued...)

Defendant the Pennsylvania State Police ("PSP") on March 23, 1998 as a police communications operator ("PCO"). During all times relevant to the instant litigation, the following Defendants were employed by the PSP at the McConnellsburg, Pennsylvania barracks of the PSP: (1) Defendant Eric Easton was employed as a sergeant and station commander: (2)Defendant Eric Prendergrast was employed as a corporal; (3) Defendant William Baker was employed as a patrol corporal; and (4) Defendant Virginia Smith-Elliot was employed as the equal opportunity officer for the PSP.[2]

On Plaintiff's first day of work another PCO, Jody Lancaster, explained to Plaintiff and two other new trainees the workings of the communications office. Defendants contend that Lancaster showed Plaintiff the women's locker room and pointed out two dressers, explaining that two of the drawers were Lancaster's and assigning separate drawers to Plaintiff and one of the other trainees. (Def. Stat. Mat. Facts "Def. Facts" at¶ 7.) However, Plaintiff avers that no one ever pointed out what drawers in the dressing room belonged to each individual employee. (Pl. Responsive Facts at ¶ 7.) When Plaintiff first began working, she had another PCO working with her. (Def. Ex. G, "Pl. Dep." at 42.) Then, in June 1998, Plaintiff attended training for her position at the police academy for two weeks. Plaintiff testified, however, that when she had questions at work, other employees would not help her "any more than they had to." (*Id.* at 69.)

[1](...continued)
or Defendants' have provided "references to the parts of the record that support the statement," as required by Local Rule 56.1.

[2]Hereinafter, where possible Defendants Easton, Baker, Prendergrast, and Smith-Elliot will be referred to collectively as the "individual Defendants."

Plaintiff testified that she began to experience "harassment" one to two weeks after she began her job. (*Id.* at 42.) With regard to Defendant Easton, Plaintiff alleges before Plaintiff began her job, Easton told Plaintiff that he had some concerns about her and that anything Plaintiff would say about Easton would be her word against his. (*Id.* at 48.) Comments that Plaintiff found offensive included Easton saying "it is awful getting old, isn't it, Nancy" and similar statements that were "constant." (*Id.* at 43.) Plaintiff was also offended by a comment from Easton that "a 25-year-old could catch on faster than [Plaintiff] could." (*Id.* at 44.) Easton contends that this statement was made in Plaintiff's defense to explain why she was having trouble catching on to the job.[3]

Plaintiff further avers that every time she would go into Easton's office "he would bring up this business about people having sex with animals. He would say, you know people have sex with animals...that's all the man wanted to talk about." (*Id.* at 46, 50.) Plaintiff was offended when Defendant Easton, wearing spandex shorts, "would sit down in the chair [near Plaintiff's work space], put his hands behind his head and spread his legs apart." (*Id.* at 46-47.) Plaintiff also testified that Easton told Defendant Prendergrast that people should teach their daughters how to "do a good blow job." (*Id.* at 49.) Easton would leer at Plaintiff when she went into his office, and she was afraid of him. (*Id.* at 50.) Plaintiff alleges that Easton told her that he would do anything for PCO Lancaster, including take a person out back and shoot them in the head. (*Id.* at 51-52.) Plaintiff testified that Easton never made any sexual advances, but that

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[3]Specifically, one of Plaintiff's co-workers had prior experience in the field, and the other had just graduated from college and was very familiar with computers.

she "didn't know what he was going to do" so she stayed away from him. (*Id.* at 51.) Plaintiff also testified that on one occasion, Easton told Plaintiff that he had dealt with his wife's paranoia for 20 years and didn't want to deal with Plaintiff's, and he told Plaintiff that his wife had small breasts. (*Id.* at 123.)

Plaintiff also had the impression that Defendant Easton "had a reputation for liking young girls." (*Id.* at 79.) Plaintiff based this on her observations of him sharing his jacket with a young female PCO, seeing him in a back hallway "pushed up against [the same individual]. His face was only inches maybe from hers." (*Id.* at 79-80.) She also observed him putting his arms around a woman in her twenties, pulling her tightly to him, and "wiggling around" with her in that position. (*Id.* at 81.)

Turning to Defendant Baker, Plaintiff testified that soon after she started sitting at the communications desk by herself, Defendant Baker would do a wrestling move "where he would cross his hands, grab hold of his private parts and yell suck it. The man did this, and he would beat on it. He would beat his hands on his crotch and yell suck it. He would ask me to do this garbage." (*Id.* at 53.) According to Plaintiff, Baker would do this five to ten times per night when she was working. Plaintiff also states that one night, when Plaintiff told Baker that she did not think he should be doing the move, Baker climbed on a chair approximately five feet from the communications desk and simulated the move again. (*Id.* at 53-54.) Plaintiff testified that "all [Baker] wanted to do was play with his crotch." (*Id.* at 57.) Plaintiff also claims that Baker "would rub his rear end and say, I have a nice ass, don't I?" (*Id.* at 59.) Plaintiff also found offensive a picture near Baker's desk of a wrestler making the same move.

Another incident involving Baker occurred when he came to work one day claiming that his back hurt, and a fellow male employee said things to him in front of Plaintiff such as "can I rub the hair on your legs?" and "can I rub your back?" (*Id.* at 61.) Then Baker went and rubbed the other employee's back and said "amorous things." (*Id.*) Baker then said to Plaintiff "what's the matter, don't you like gays?" (*Id.*) Baker also commented to Plaintiff that he was going to get his penis pierced and that his wife was going to get her nipple pierced. (*Id.* at 63.) Finally, Baker would refer to Plaintiff as "momma."

Plaintiff did tell Baker that she was offended by the wrestling move and the back rubs, but when asked why she did not tell anyone else about the events she responded that "there was no one on that station that I could go to. I had a sergeant there who was talking about abusing children and bestiality. There was no way I was going to be able to tell him. There was nobody." (*Id.* at 65.)

Regarding Defendant Pendergrast, Plaintiff contends that he would verbally "pound" her day after day, referring to Plaintiff as a liar and telling her that the village idiot could do her job. (*Id.* at 67.) Plaintiff also testified that Pendergrast would wear black gloves and hit the side of the communication desk across from Plaintiff, and that this was intimidating. (*Id.* at 73.) Plaintiff contends that Pendergrast was proud to be compared to a "storm trooper" or a "Nazi." (*Id.*)

At some point during Plaintiff's employment, an accident file turned up missing. Defendant Baker asked Plaintiff if she had the file and she responded negatively. Plaintiff testifies that Defendant Pendergrast accused her of taking the file home. (*Id.* at 76.)

Plaintiff complained about the incidents at work to Mikael Fix, a Republican Party Chairman who helped Plaintiff obtain her position. When Plaintiff was in training in June 1998, Virginia Smith-Elliot taught a class on sexual harassment. Plaintiff approached Smith-Elliot and told her that she might need some help, and Smith-Elliot gave Plaintiff her phone number. (*Id.* at 93.) Plaintiff did not contact Smith-Elliot until August 18, 1998, two days before she resigned from her position. Plaintiff contacted Smith-Elliot by phone and told her that she was afraid and that she was being harassed. (*Id.* at 94.) Plaintiff says that Smith-Elliot told her to fill out a form that Plaintiff was unsure how to obtain, to which Smith-Elliott responded "I'll see what I can do." (*Id.* at 95.) Plaintiff states that she looked through manuals to see what she could do about the harassment, but never found a form to fill out, and that she felt as though Defendant Pendergrast was watching her all the time. Plaintiff says that Smith-Elliot did not agree to send her the form or even ask for her address. When asked about her contact with Plaintiff, Smith-Elliot recalls complaints of age and political affiliation discrimination, but not complaints of sex discrimination. Plaintiff states that she had seen the PSP's sexual harassment policy, and Smith-Elliot testified that she believes it was posted at the McConnellsburg barracks and that it went out per capita to each employee. (Smith-Elliot Dep. at 42.)

Plaintiff received a supervisor's notation on July 22, 1998 because she failed to complete an assignment that had been given to her on May 12, 1998. On July 26, 1998, Plaintiff was counseled because she put a message about a criminal escapee from Ohio in the crime corporal's bin, but did not disseminate the information to patrols. Plaintiff states that someone in the office told her not to worry about the message because the escapee was from Ohio. (*Id.* at 143.) Defendants Prendergrast and Easton testified that Plaintiff was disorganized, that she

became overwhelmed by her job responsibilities easily, and she did not handle constructive criticism well. (Prendergrast Dep. at 10; Easton Dep. at 39, 45-46, 66.)

There was an employment related exam that Plaintiff had to take three times. Defendants contend that Plaintiff failed the exam, but Plaintiff believed that her test results were hidden from her and that she was lied to about them. (Pl. Dep. at 155-60.) The test results were kept in a file drawer in the dresser kept by Defendant Lancaster in the ladies locker room. Plaintiff had gotten into the drawer on two occasions prior to the night that she resigned. When papers were missing from the drawer, a file was dusted with theft detection powder and placed back into the drawer. On August 20, 1998, Plaintiff again went through papers in the drawer, and when she returned to the communications area, she had blue on her hands. Plaintiff contends that she had a right to be in the drawer because "[s]he had found some of her personal papers in there, and the drawer was not assigned to anyone person." (Pl. Counter Stat. Facts at ¶ 51.)

Defendant Easton says that Plaintiff was told to take the rest of the evening off after questioning her about the blue on her hands. (Easton Dep. at 69.) Plaintiff contends that she was "abused, threatened and held against her will." (Pl. Counter Stat. Facts at ¶ 53.) Specifically, Plaintiff testified as follows to the events of that evening:

> Baker was there. He said — he said, that's bad getting into somebody's stuff.... I said, I didn't get into anything in here.... I told Baker — I said, well, I'm resigning. I couldn't — you know, I think at that point I said — and he said — I said, I'm resigning.... And he said, well, you can't leave. And I said, well, I'm going to leave. I said, I'm resigning, I'm leaving. I couldn't stand — take it anymore. And he said to me — he

> said, well, you're not leaving. He said, you're a suspect.

(Pl. Dep. at 102.) Plaintiff turned in a resignation letter that she had been carrying with her.

Plaintiff filed the instant action on September 18, 2000. Plaintiff seeks redress for discrimination based on age, political affiliation and sex. Specifically, Plaintiff contends that she was "forced to endure an insulting, humiliating work environment, and ... forced to suffer a termination of employment because she would not yield to sexual suggestions, innuendoes, and solicitous behavior." (Compl. at ¶ 1.) Plaintiff states her claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000 *et seq.*; and the Pennsylvania Human Relations Act ["PHRA"), 43 Pa. Cons. Stat. Ann. § 951 *et seq.*

II. Legal Standard: Motion for Summary Judgment

Federal Rule of Civil Procedure 56 provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis which would allow a reasonable fact-finder to return a verdict for the non-moving party. *Id.* at 249. The court must resolve all doubts as to the existence of a genuine issue of material fact in favor of the non-

moving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985).

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in her complaint; instead, she must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, and designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)(internal quotations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will beard the burden at trial." *Id.*

III. Discussion

A. Individual Liability under Title VII and the ADEA[4]

The individual Defendants move for summary judgment on all of Plaintiff's Title VII claims arguing that individuals cannot be held liable under Title VII. The individual Defendants also note that ADEA claims are also barred against individual defendants.

Title VII provides that it is unlawful for an employer to discriminate against an individual on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). The Third Circuit has specifically held that "Congress did not intend to hold individual

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[4]The court here notes that Title VII does not prohibit discrimination based on political affiliation. Therefore, the court will not address the merits of Plaintiff's political affiliation discrimination claims.

employees liable under Title VII." *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 184 (3d Cir. 1977)(citing *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996); *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996)).

In response, Plaintiff contends that the definition of "employer" contained in Title VII includes "any agent" of the employer, 42 U.S.C. § 2000e-(b), and suggests that this language allows for suits against the individual Defendants. The court is not persuaded by Plaintiff's argument. Prior to the Third Circuit's decisions in *Sheridan, Kachmar,* and *Dici,* at least one district court in this circuit was presented with an argument that individuals could be held liable under Title VII based on the inclusion of the term "any agent" in the definition of employer. *See Caplan v. Fellheimer Eichman Braverman & Kaskey*, 882 F. Supp. 1529, 1523 (E.D. Pa. 1995). At that time the circuits were split on whether an individual could be held liable under Title VII as were the district courts in this circuit. *Id.* at 1531.

Relying on Fifth and Ninth Circuit precedent, the court in *Caplan* held that "the references to 'agents' in the definition of employer [in Title VII] is simply to incorporate respondeat superior liability into Title VII." *Id.* at 1532 (citing *Grant v. Lone Star Co.*, 21 F.3d 649, 651 (5th Cir. 1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993)("There is no reason to stretch the liability of individual employees beyond the respondeat superior principle intended by Congress.")). In deciding *Sheridan*, the Third Circuit aligned itself with the circuits that held against individual liability under Title VII, and did not find that the reference to "agents" in Title VII allowed for individual liability. Thus, the court will grant summary judgment in favor of the individual Defendants on Plaintiff's Title VII claims.

The ADEA prohibits discrimination against employees based on their age, and it allows for suits against employers for such discrimination. 29 U.S.C. § 623(a). Moreover, as in Title VII cases, federal courts have refused to allow individual liability under the ADEA. *See, e.g., Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 685 (5th Cir. 2001)("the ADEA 'provides no basis for individual liability for supervisory employees.'" (citing *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996)); *Hiler v. Brown*, 177 F.3d 542, 546 (6th Cir. 1999) ("[N]umerous courts...have held that supervisors, sued in their individual capacities, are not included within the statutory definition of 'employer' under Title VII and its sister civil rights statutes, and accordingly cannot be held personally liable for discrimination."); *Miller v. Maxwell Intl, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993)(holding that individuals not liable under Title VII of the ADEA). Therefore, the court will also grant summary judgment in the individual Defendants' favor on Plaintiff's ADEA claims.

B. Eleventh Amendment Immunity

The court will grant summary judgment in favor of the PSP on Plaintiff's ADEA and PHRA claims because Pennsylvania enjoys Eleventh Amendment immunity. The Eleventh Amendment of the United States Constitution bars suits against a state or state agency in federal court by citizens of any state. *See, e.g., Atascadaro State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984).

Exceptions to Eleventh Amendment immunity exist only where a Plaintiff alleges an on-going violation of federal rights and seeks prospective relief, or where the state consents to suit in federal court. *See Ex Parte*

Young, 209 U.S. 123, 159 (1908); *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981). Here Plaintiff seeks redress for alleged wrongs that occurred in the past, thus the first exception to Eleventh Amendment immunity does not apply. Moreover, Pennsylvania has not waived Eleventh Amendment immunity. *See Laskaris*, 661 F.2d at 25 (recognizing that Pennsylvania has "specifically withheld consent" to suit in federal court under 42 Pa. Cons. Stat. Ann. § 8521(b)).

Plaintiff argues that the ADEA defines employer as "a state or political subdivision of a State and any agency or instrument of either." 290 U.S.C. 690(b). However, the Supreme Court specifically held in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) that "in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals." *Id.* at 91. Thus, Plaintiff cannot assert an ADEA claim against a state agency, and the court will grant summary judgment in favor of the PSP on Plaintiff's ADEA claim. Furthermore, Eleventh Amendment immunity extends to claims premised on state law causes of action. *See Pennhurst*, 405 U.S. at 105. Therefore, the court will also dismiss Plaintiff's PHRA claims against the PSP.

Finally, with regard to Plaintiff's PHRA claims, Defendants contend that the Eleventh Amendment bars the claims against both the PSP and the individual Defendants because it bars claims against state officials who are sued for actions taken within the course of their employment. Plaintiff has failed to respond to Defendants' arguments regarding the application of the Eleventh Amendment to Plaintiff's PHRA claims.[5] Thus, the court

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[5]Plaintiff does caption a section of her opposition brief "The PHRA and the 11th Amendment." (Pl. Br. in Opp. Mot. For (continued...)

will grant Defendant's motion for summary judgment on Plaintiff's PHRA claims against the individual Defendants. *See Mueller v. CBS*, No. 99-CV-1310, 2001 WL 528988, at *4(W.D. Pa. Jan. 31, 2001)(holding that the court will not do the lawyers' work for them and a lawyer who fails to press a point forfeits the point).

C. Title VII Claims against the Pennsylvania State Police

1. Hostile Work Environment

In order to establish a claim for employment discrimination due to an intimidating or offensive work environment, "a plaintiff must establish 'by the totality of the circumstances, the existence of a hostile or abusive environment which is severe enough to affect the psychological stability of a minority employee.'" *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) *(quoting Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1053, 1510 (11th Cir. 1989)). Specifically, a plaintiff must show: (1) that she suffered intentional discrimination because of her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected her; (4) the discrimination would detrimentally affect a reasonable person of the same sex in the same position; and (5) the existence of respondeat superior liability. *Kunin v. Sears Robuck and Co.*, 175 F.3d 289, 293 (3d Cir. 1999)(describing the requirements for sexual harassment).

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[5](...continued)
Summ. Jud. At 7.) However, the substance of this subsection is two sentences asserting supplemental jurisdiction pursuant to 28 U.S.C. § 1367. These two sentences do not deserve to even be considered as responsive to Defendant's substantive arguments.

The PSP argues that the first prong, discrimination based on sex, is not met here because "the comments and actions allegedly done in plaintiff's presence....were generally not directed toward her." (Defs. Br. In Supp. Mot. Summ. Jud. at 6.) However, the Third Circuit has held that a hostile work environment can arise from the frequent use of insulting and derogatory language relating to women. *See Andrews*, 895 F.2d at 1485-86 (quoting *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988)). Conduct that may be relevant to the inquiry includes name calling, pornography, and displaying sexual objects on desks. *See, e.g., Andrews*, 895 F.2d at 1486. Thus, the court cannot say as a matter of law that the comments and actions must be directed at Plaintiff in order to be discrimination based on sex.

The second, third, and fourth elements of a hostile environment claim, pervasiveness, subjective offensiveness, and objective offensiveness, are interrelated. It is well-settled that "isolated or single incidents of harassment are insufficient to constitute a hostile environment." *Rush v. Scott Speciality Gases, Inc.*, 113 F.3d 476, 482 (3d Cir. 1997). Instead, a defendant's conduct must be objectively offensive to the extent that it alters the conditions of employment for the victim in order to be actionable under Title VII. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998); *Farragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998). In determining whether a work environment is objectively hostile, courts are not to examine the scenario on an incident-by-incident basis, but instead must consider the totality of the circumstances. *Andrews*, 895 F.2d at 1485; *Stair v. Lehigh Valley Carpenters Local Union No. 600*, 813 F. Supp. 1116, 1119 (E.D. Pa. 1993). Relevant factors may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance; nonetheless, no single

factor is either required or determinative. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

Viewing the evidence in the light most favorable to Plaintiff, the court finds that there was enough conduct in the instant action to raise an issue of fact that the atmosphere was sufficiently hostile to offend a reasonable person in Plaintiff's position. Most persuasive is Plaintiff's testimony regarding the "wrestling move" that Defendant Baker allegedly repeated five to ten times during each shift that he worked with Plaintiff. Plaintiff testified that Baker "would cross his hands, grab hold of his private parts and yell suck it. The man did this, and he would beat on it. He would beat his hands on his crotch and yell suck it. He would ask me to do this garbage." (Pl. Dept. At 53). The fact that one evening when Plaintiff complained about the move, Baker climbed on a chair approximately five feet from her and simulated the move again indicates that he was relentless even knowing that it was offensive to Plaintiff. (*Id.* at 53-54.) Plaintiff also testified that Baker "would rub his rear end and say, I have a nice ass, don't I?" (*Id* . at 59). Adding to Plaintiff's claims are comments by Defendant Easton that if he had a daughter he would teach her to give "blow jobs"; repeated discussions about sex with animals; and statements about his wife's breast size. (*Id.* At 46-52, 123.) While these events standing alone might not lead to an objectively hostile work environment, viewed in their totality, a reasonable person in Plaintiff's position could find that there existed a hostile work environment.

Regarding the subjective element of a hostile environment claim, Defendants aver that Plaintiff did not suffer any identifiable ill consequences and that the alleged discriminatory conduct did not result in an inability to do her job. (Def. Br. in Supp. Mot. For Summ. Jud. at 9.) The court finds this unpersuasive as Plaintiff has testified that the conduct was offensive to her, that

on at least one occasion she did not go into work because of it, and that she felt compelled to write a letter of resignation. Thus, the court finds that the subjective test is met.

Finally, addressing the issue of vicarious liability, Defendants contend that liability only exists where an employer knew or should have known about the harassment and failed to respond. (*Id.* at 10 (citing *Meritor*, 477 U.S. at 71).) Defendants argue that there is no way that the PSP had actual notice of the allegedly discriminatory conduct prior to Plaintiff contacting Defendant Smith-Elliot two days before she resigned. Defendants further contend that Plaintiff did not avail herself of the procedures in place to report the alleged harassment, and that Plaintiff cannot maintain constructive knowledge on the part of the PSP.

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court addressed the scope of employer liability for hostile work environments. The Court in *Faragher* adopted the following rule:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. At 777-78 (citation omitted).

The court went on to discuss the relevance of employers having antiharassment policies in place:

> While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Id. at 778.

In the case *sub judice*, Defendants contend that the PSP's sexual harassment policy was located in the McConnellsburg barracks in the Administrative Regulations manuals, that the policy went out to each employee, and that it was posted on the bulletin boards in the McConnellsburg barracks. Smith-Elliot's testimony was as follows:

> Q: Is the sexual harassment policy posted?
>
> A: It has been.
>
> Q: In the barracks?
>
> A: Yes.

> Q: Do employees sign for the sexual harassment policy; basically sign that they read it?
>
> A: If I recall correctly, during the time that I was there there were some changes made to the sexual harassment policy. Like I said I believe that it went out per capita to each employee, but also that it was supposed to be posted on bulletin boards.
>
> And what they do is they have just a check-off list with everyone's name from the station on that list. Then as you read it, you're supposed to check off that you did read the policy.

(Smith-Elliot Dep. at 42.) Defendants further aver that Plaintiff was aware of the sexual harassment policy, that she probably received it during training, and that she found the policy in the Administrative Regulations manual. (Pl. Dep. at 82.)

The PSP's sexual harassment policy includes in the definition of sexual harassment "Making suggestive or provocative gesture, e.g., leering, staring, inappropriate gestures, comments, jokes or stories of a sexual nature." (Pl. Dep. Ex. 4, "Harassment Policy" at 2 ¶ C.3.) The policy further provides that "[a]ny person who believes they have been sexually harassed shall contact their immediate supervisor or the Affirmative Action Office." (*Id.* at 3¶ A.)

In the instant action, it is undisputed that Plaintiff's alleged harassers were supervisors, thus the court cannot hold that Plaintiff acted unreasonably by failing to bring her complaints to these individuals pursuant to the PSP's sexual harassment policy. However, Plaintiff also failed to contact the Affirmative Action Office as required by the sexual harassment policy. Plaintiff did approach Smith-Elliot in June 1998 during training, and Smith-Elliot gave

Plaintiff a phone number to call regarding any problems that she was having. (Pl. Dep. at 93.) However, Plaintiff chose not to contact the Affirmative Action office during the interim period when the majority of the allegedly harassing behavior took place. Plaintiff finally did contact Smith-Elliot on August 28, 1998, however, this was only two days before she resigned. Smith-Elliot told Plaintiff to fill out a complaint form, located in the Administrative Regulation manual. However, Plaintiff resigned from her employment two days later, and the PSP was never given the opportunity to respond to any complaints of sexual harassment. The court finds as a matter of law that Plaintiff unreasonably failed to avail herself of the PSP's internal procedures for reporting any harassment. This is especially true as Plaintiff had personal contact with the Affirmative Action officer early in her employment, but failed to pursue this avenue of complaint.

As Plaintiff has failed to meet the fifth element of a claim for hostile work environment, e.g., respondeat superior liability, the court will grant Defendants' motion for summary judgment on this issue.

D. Retaliation.

Plaintiff's complaint also states that she was the victim of retaliation. However, Plaintiff has failed to establish any element necessary for a retaliation claim. Title VII prohibits an employer from "discriminat[ing] against an[]...employee[]...because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000(e)-3(a). To establish a *prima facie* claim of Title VII retaliation, a plaintiff must show: (1) that she engaged in protected activity; (2) that the employer took adverse action against her; and (3) that a causal link exists between the protected activity and

the employer's adverse action. *See Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir. 1997).

Plaintiff in the instant action has failed to allege any protected activity that she engaged in. Plaintiff did not file her PHRA claim until after she resigned. Furthermore, there is no adverse employment action indicated in any part of the record. Plaintiff argues that she was retaliated against for reporting the harassing conduct to her state Senator, and that she was "finally forced into a no win resignation." (Pl. Br. in Opp. Mot. Dis. at 5.) Speaking to a state Senator does not fall within the activities protect by Title VII which include testifying, assisting, or participating in an investigation, proceeding, or hearing of a Title VII violation. Finally, even if Plaintiff's complaint to her Senator did fall within the realm of protected activity, Plaintiff cannot show an adverse employment action to satisfy the second element of the prima facie retaliation case. Plaintiff acknowledges that she had written her letter of resignation and was carrying it around in her purse when she turned it into her supervisors. There is no evidence of record that she was forced to do this. In fact, she was told only to take the rest of the evening off on the night that she resigned. Finally, even if Plaintiff had been forced to resign, she has failed to raise even an issue of fact as to a causal connection between contacting her state Senator and her resignation. Therefore, the court will also grant summary judgment in favor of Defendants on Plaintiff's retaliation claim.

IV. Conclusion

In accordance with the foregoing, the court will grant summary judgment in favor of Defendants on all counts of Plaintiff' s complaint. An appropriate order will issue.

/s/
SYLVIA H. RAMBO
United States District Judge

August 16, 2001